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WYOMING REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

WYOMING

FROM

JULY 11, 1918, TO APRIL 2, 1920.

REPORTED BY

WILLIAM E. MULLEN

VOL. 26

LARAMIE, WYOMING:
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1920

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JUSTICES OF THE SUPREME COURT OF THE STATE OF WYOMING

DURING THE PERIOD COVERED BY THIS VOLUME.

CYRUS BEARD, *Chief Justice.*
CHARLES N. POTTER, *Justice.*
CHARLES E. BLYDENBURGH, *Justice.*

Clerk, FRED F. FOBES.
Deputy Clerk, FRANK V. BOOKER.
Attorney General, WILLIAM L. WALLS.
Deputy Attorney General, VINCENT CARTER.

DISTRICT JUDGES

DURING THE PERIOD COVERED BY THIS VOLUME.

First District, WILLIAM C. MENTZER, *Cheyenne.*
Second District, VOLNEY J. TIDBALL, *Laramie.*
Third District, JOHN R. ARNOLD, *Evanston.*
Fourth District, JAMES H. BURGESS, *Sheridan.*
Fifth District, PERCY W. METZ, *Basin.*
Sixth District, CHARLES E. WINTER, *Casper,* until August 28, 1919.
RALPH KIMBALL, *Lander,* from August 28, 1919.
Seventh District, E. C. RAYMOND, *Sundance,* until May 17, 1920.
HARRY T. ILSLEY, *Sundance,* from May 17, 1920.

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In Memoriam

RICHARD H. SCOTT

HONORABLE RICHARD H. SCOTT, Justice of the Supreme Court of Wyoming from February 24, 1906, and Chief Justice from January 4, 1913, to January 4, 1915, died at Cheyenne, Wyoming, on the 26th day of September, 1917. He was born on September 3, 1858, in Hennepin County, Minnesota, and was educated in the public schools and the United States Naval Academy, Annapolis, Maryland, graduating from said Academy with the Class of 1880. He served for one year in the Navy after graduation, then resigned from the service and entered upon the study of law. He located at Sundance, Crook County, Wyoming, on July 5, 1886, where he entered upon and continued the practice of the law until his election as District Judge of the First Judicial District at the first State election in 1890. He was elected and served as a member of the Wyoming Constitutional Convention in 1889. He occupied the office of District Judge aforesaid from 1890 until 1906, and until his appointment, on February 3, 1906, as Justice of the Supreme Court to fill the vacancy caused by the resignation of Justice Van Orsdel, and continued to hold that office by election at the next general election and by subsequent re-election until his death.

At the session of the Supreme Court on October 1, 1917, the first day of the October, 1917, term, the following proceedings occurred in said Court:

ANNOUNCEMENT OF DEATH OF JUSTICE RICHARD H. SCOTT.

The Chief Justice said:

"It is with profound sorrow that the members of this Court announce the death of their late associate, Mr. Justice Richard H. Scott. After an illness lasting many months, but during most of which time he was able to be up and around but not to do any work, he passed away at St. John's Hospital in Cheyenne, September 26, 1917.

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"Judge Scott had rendered most distinguished services to this State, and was able, genial, kindly, and possessed the very highest ideals. He was elected District Judge of the First Judicial District at the first State election in 1890, at that time residing in the town of Sundance, in Crook County. Soon thereafter he removed to Cheyenne, then in the same judicial district, and he was subsequently twice re-elected as Judge of said district, serving in that office about sixteen years, when he was appointed to succeed Mr. Justice Van Orsdel, upon the latter's resignation, as a Justice of this Court. Thereafter he was elected and re-elected, serving as Justice and Chief Justice, alternately, under the Constitution, until the date of his death. He was a most useful citizen, a devoted husband and father, and his death is mourned throughout the entire State. Out of respect to his memory, it is ordered that the entrance to the Supreme Court and the court room be appropriately draped with crepe for thirty days, and that the Court now adjourn."

Thereafter memorial resolutions adopted by the Bar of the respective counties named therein were presented to the Court and ordered to be spread at large upon the journal.

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REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT

OF THE

STATE OF WYOMING

[APRIL TERM, 1918.]

BOARD OF COMMISSIONERS v. FEATHERSTONE.

(No. 881; Decided August 7th, 1918; 174 Pac. 192.)

TAXATION—PRESUMPTIONS—LEGALITY OF TAX LEVY—INJUNCTION—OFFICIAL ACTION—COMPLAINANT'S INTEREST—COLLECTION OF TAXES—TAX SALE—OFFICIAL ACTS—ADVERTISEMENT OF TAX SALE—ACCOUNT—EQUITABLE JURSIDICTION—ADEQUATE REMEDY AT LAW.

1. Where it does not appear from the pleadings or evidence in an action to restrain the county treasurer from advertising at the expense of the county, a tax sale of irrigation district land, that taxes were levied on such land, the levy will be presumed to have been made as required by statute.
2. Where a county disclaiming liability for the expense of advertising a tax sale of irrigation district land may disallow a claim therefor and set up a complete defense to an action brought thereon, an injunction to restrain the treasurer from advertising such sale is unnecessary.
3. In a suit by a county and a resident thereof to restrain the county treasurer from advertising a tax sale of irrigation district land at the county's expense, where it did not appear that it either owned any of such land, or had any interest in the collection of such tax, an injunction should not be granted.
4. In an action to restrain the treasurer from advertising a tax sale of land upon the ground that such advertisement was futile and a waste of money, the court cannot assume, from failure to sell such land at former tax sales, that there would be no bidder at the proposed sale.
5. An injunction will not be granted to restrain a county treasurer from advertising tax sale of land upon the ground that the advertisement would be futile and a waste

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of money, although it can be assumed or proved that there would be the same lack of bidders at the proposed sale as at former tax sale of same land, where advertisement was required by statute for enforcement of the tax.

6. An action for accounting will not lie, where the account, if any, is all on one side and consists of four items of money paid; the money being recoverable in law as conveniently as in equity.

ERROR to District Court, Albany County; HON. V. J. TIDBALL, Judge.

Action by The Board of Commissioners of Albany County and another against Bernard Featherstone, as the county treasurer and ex officio tax collector of the county, and another. Judgment for defendants and plaintiffs bring error.

C. P. Arnold and *J. R. Sullivan,* County Attorney, for plaintiffs in error.

There is no warrant of law that a county is ever involved in the fiscal affairs of an irrigation district; since it is a voluntary association of land owners for the irrigation of their property. (Sec. 829, Comp. Stats. 1910.) Its affairs are managed by its own directors and official bonds run to the district. (Secs. 832-834, Comp. Stats. 1910.) The property is owned by the district. (Secs. 841-842, Comp. Stats. 1910.) Taxes are levied as special. (Section 847, Comp. Stats. 1910.) Officers are paid by the district. (Sec. 854, Comp. Stats. 1910.) Districts may be dissolved as private corporations. (Sec. 868, Comp. Stats. 1910.) The county treasurer is ex-officio treasurer of the district, but he reports to the Board of Directors and not to the County Commissioners. (Sec. 849, Comp. Stats. 1910.) The act imposes certain duties upon the treasurer. (Sec. 849, Comp. Stats. 1910.) There is no justification for the use of public funds for irrigation district purposes; the character of irrigation districts of this class has been defined by the Supreme Court of Washington, as an organization for the improvement of property within the district by the owners thereof. (Board v. Peterson, 29 Pac. 995.) And in Idaho as a public quasi

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corporation organized to conduct business for the benefit of the owners of lands within its limits holding its property in a proprietary rather than a governmental capacity. (City of Nampa v. District, 1911; 115 Pac. 980.) The creation of irrigation districts, unlike drainage districts, is unsupported by principles of police power, and being in the nature of private enterprises cannot levy a tribute upon the property of other taxpayers in the county. The State Constitution clearly prohibits this. (Art. 1, Sec. 28.) The State may not engage in the work of internal improvements without two-thirds vote of the people. (Art. 16, Sec. 6; Gray's Lim. Tax. Pr. 440, p. 242.) The Constitution prohibits counties from extending financial aid to such associations. The State is precluded from loaning public credit to private corporations, directly or indirectly. (Cooley, Hist. Mich. 279; People v. State, 23 Mich. 499; Thomas v. City of Port Huron, 27 Mich. 320; People v. Common Council, 28 Mich. 227.) Nor can such burdens be sustained on the theory of benefit to the general municipality. (Dillon, Mun. Corps., 5th ed., Sec. 120; Attorney General v. Pingree, 79 N. W. 814.) The judgment of the court below denying plaintiff in error judgment for the money it has paid out and that county funds should be expended in advertising tax sales of irrigation district property should be reversed.

Corthell, McCollough & Corthell, for Featherstone, defendant in error.

This brief is filed in support of cross errors assigned by the county treasurer; the exceptions being to the eleventh and twelfth findings of law. The treasurer objects to so much of the eleventh finding as relates to the lien of the county upon district lands sold for taxes; objection is made to the twelfth finding in that it is apparently assumed that the county has a prior lien for costs of advertising and that the lands have been bid in by the county treasurer as a matter of legal construction; there is no provision of law expressly or impliedly declaring such a lien; it is not created by simply taking thought on the subject, nor because it might be deemed a convenient thing in itself. A lien can only be

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created with the owner's consent by contract, express or implied, or by operation of law. (25 Cyc. 663; Frost v. Atwood, 41 N. W. 96.) A court of equity cannot create a lien. (Dehn v. Dehn, 136 N. W. 453.) It is usually a creature of statute. (Wyman v. Quayley, 9 Wyo. 326; Thomas v. Mann, 22 Wyo. 99.) And the rule applies to tax liens. (Miller v. Anderson, 47 N. W. 957.) A lien established against real property is not to be extended by implication to personal property. (Jaffray v. Anderson, 24 N. W. 527, 528.) Nor implied from a mere provision in a city charter making general statutes applicable to towns. (Quimby v. Wood, 35 Atl. 149, 151.) It is the doctrine of this court that such implications will not be entertained. (Turner v. Horton, 18 Wyo. 281.) The assumption that a ministerial act will be presumed to have been performed whether it has in fact been performed or not is entirely novel; the doctrine would seem to supplant and supersede the remedy of mandamus. (Sec. 5054, Comp. Stats. 1910; State v. Board, 7 Wyo. 478.) If the official duty of this character can be treated as performed merely by the statutory mandate, why provide remedy by action? (People v. Lewis, 92 N. Y. S. 642. See also Warmolts v. Keegan, 54 Atl. 813; Newton v. Leal, 56 S. W. 209; U. S. v. Schurz, 102 U. S. 378; State v. Staub, 23 Atl. 924.)

Cassius M. Eby, for defendant in error, Laramie Valley Municipal Irrigation District.

Since large sums have been expended by the county in advertising district lands for sale in previous years without bidders, it seems idle to continue a procedure entailing such a needless charge without benefit either to the bondholders, owners of delinquent lands, or defendant district. The taxes are special in their nature. (Secs. 847, 848, Comp. Stats.) The local assessment is exceptional both as to time and locality. (2 Cooley on Taxation, Sec. 1154.) No bondholders are made parties to either proceeding, nor have bondholders made an effort to raise money to liquidate unpaid interest or matured bonds; they are not complaining. None of the parties to this action can be benefited unless the

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county can be benefited by taking over the lands at tax sale; not every act of a taxing statute is mandatory. Many are merely directory. (Baltimore v. Hortor, 48 Atl. 445; Walker v. Edwards, 197 Pa. St. 645; Matter v. Gibbons, 56 Hun 650; State v. Baldwin, 62 Minn. 518; Oceana County v. Hart, 48 Mich. 319; Alvord v. Collins, 20 Pick. 418.) Inasmuch as bondholders are not complaining, it seems futile to continue a needless expenditure of public money in advertising district lands for sale in the collection of these taxes. By express terms of the law, the district board is precluded from fixing the rate of levy. (Secs. 847-849, C. S.) The duties imposed upon the county board are analagous to that in connection with district school taxes. (Sec. 2404, C. S.) The action was brought to restrain the treasurer from the further publication of delinquent district tax lists, but seems to have been tortured into an effort to recover money expended by the county officials; finally the district sustains a relation to the county similar to that of a school district, or a drainage district, and funds raised for the district are for a public purpose. (1st Cooley on Taxation, 211.) The use of water for the irrigation of land provided for use in the Wright Act is a public use. (Lux v. Haggin, 69 Cal. 303; Stockton v. Stockton, 41 Cal. 166.) The Wright Act above referred to is the California Irrigation District Law subsequently borrowed and enacted in a number of other states, including our own. The use must be regarded as a public use, else no general scheme of irrigation can be formed or carried into effect. (Fallbrook Irrigation District v. Bradley, 164 U. S. 161.) Irrigation districts conserve a public as well as a private interest. (Argyle v. Johnson, 118 Pac. Rep. 493; Lundberg v. Green River Irrigation Dist., 119 Pac. Rep. 1041.) The Irrigation District Act adopts all the machinery of the general tax law for the collection of district taxes. (Sec. 850, Comp. Stats.) The county authorities can impose all necessary expenses of this character upon the irrigation district. (Nevada Bank v. Board of Supervisors, 91 Pac. 124.) The county treasurer controls the procedure prescribed by law for advertising the sale of real estate for

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delinquent taxes. (Board v. Chaplin, 5 Wyo. 74.) The fact that they are special taxes does not take them out of the operation of the revenue laws of the state, or make them any the less public. (Tull v. Roysten, 2 Pac. 868; McCord v. McIntyre, 138 Pac. 59.) The county alone is in position to protect itself for any expense and charges incurred by bidding in the land in the absence of other bidders. It is absurd to contend that the district should pay for an expense incurred over which it has no control. A district is a public corporation and can sue and be sued in its corporate capacity. (2 Weil Water Rights, p. 1255, L. ed.) It is a creature of the legislature in the same sense and with political powers as are possessed by cities and towns. (92 Cal. 296; 28 Pac. 272; Pioneer Dist. v. Walker, 119 Pac. 304.) Defendant district excepted to conclusion of law number twelve holding it to be a ministerial duty of the treasurer to bid in lands when no bids were received and by further holding that when no bids are offered at such sale the lands are by operation of law held to have been bid in by the county, whether expressly bid in or not. One of the effects of which doctrine would be to remove a considerable portion of real property from the burden of taxation. As under the law, such lands would be placed in a separate column and not taxed again until sold by the county. The judgment below should be approved and affirmed; the statute relating to assessments for interest due upon irrigation district bonds should be held to be advisory and not mandatory; lands bid in at tax sales by the county treasurer or by operation of law should not be placed in separate lists, as far as the same relate to maintenance taxes, but should be left to bear their just and equal proportion of such taxation.

Corthell, McCollough & Corthell, brief of defendant in error, Featherstone, in answer to brief of plaintiff in error.

It seems unnecessary to discuss the point as to whether defendant district is a private corporation; that they are public is well settled by the decisions. (Fallbrook Irrigation Dist. v. Bradley, 164 U. S. 112, 159; Turlock Irrigation District v. Williams, 76 Cal. 360, 18 Pac. 379; McCord

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Mercantile Company v. McIntyre, 138 Pac. 59, 60; Board of Directors of Irrigation District v. Collins, 64 N. W. 1086, 1090.) This being true, the relations of the district to the county are much simplified. Counties are subordinate agencies for the orderly government of the state within the scope of their authority, and as such are subject to the control of the legislature. (11 Cyc. 342; Laramie County v. Albany County, 92 U. S. 307.) The exact apportionment of burdens and benefits in the administration of county affairs is impracticable; e. g., the establishment of a highway, the building of a bridge, courthouse or mail must result in special benefits to particular persons or particular districts, but the doing of these things is not prohibited, nor is the expense minutely or exactly balanced against the benefits accruing. So the objection made that duties are imposed upon county offices for the benefit of particular districts incurring county expense, where no direct benefit is received, is not peculiar to the Irrigation District Law. School taxes are an example. (Sec. 2401, Comp. Stats.) But they are not a part of the county revenue proper. (Powder River Co. v. County, 3 Wyo. 597.) Likewise, high school district taxes. (Sec. 2069, Comp. Stats.) And town taxes. (Laws, 1913, p. 81.) The machinery of county government is thus employed in the levy and collection of state taxes and counties made absolutely liable for the amount legally levied. (Sec. 2380, Comp. Stats.) This has been upheld as a valid exercise of the legislative power. (State v. Commissioners, 8 Wyo. 104; Kelley v. Rhoades, 7 Wyo. 237.) So the power of the legislature to direct the use of machinery of county government in the relation of taxes and revenues necessary for the use of a public municipal irrigation district seems clear. It is fair to assume that the legislature had in view the corresponding public benefits resulting from such irrigation districts. (Board of Commissioners v. Otero, 56 Colo. 515, 139 Pac. 546.) In fact the greater part of taxes imposed and collected by counties are for the direct benefit of other communities or agencies than the county proper; note the Act of 1884. Section 3898, R. S. 1887,

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authorizing Albany County to expend money for roads and bridges outside the county. Similar legislation has been elsewhere upheld. (Carter v. Cambridge Co., 104 Mass. 236; State v. Board, 85 N. E. 513.) The district law is not invalidated for failure to provide a method to reimburse the county for costs and expenses in the assessment and collection of district tax. (State v. Mudgett, 57 Pac. 351.) It would seem clear that the legislature had power to require county officers to assess the property and to levy, extend and collect the district taxes involved in this case. It is the duty of county boards to apportion and order the levying of taxes provided by law. (Sec. 1166, subdiv. 4, C. S. 1910; Sec. 2343, Comp. Stats. 1910.) And specifically it is made the duty of the board to make levies of district taxes. (Sec. 847, Comp Stats.) The district officers are without power in the premises, so it thus became the duty of the county treasurer to collect these taxes equally with other taxes. (Secs. 849, 1183, Comp. Stats.) And the general provisions of the revenue law are made applicable. (Sec. 850, Comp. Stats. 1910.) The treasurer has no discretion to omit the collection of the taxes. He is responsible under his bond for reasonable skill, diligence, good faith and honesty in the performance of his duties. (Sec. 1184, Comp. Stats. 1910.) This includes the advertising of property for sale for the collection of delinquent taxes. (Sec. 2413, Comp. Stats.) Failure to perform this duty is a misdemeanor. (Sec. 1199, Comp. Stats. 1910.) We have in this case the astonishing situation that the county commissioners have levied a tax, commanded the treasurer to collect it, and upon resort by the treasurer to the usual means of obeying these commands, have issued an order forbidding him to do so, followed by resort to the courts for an injunction; the procedure is the only one which can be resorted to for the relief of the bondholders and others interested. (Marra v. San Jacinto P. v. Irrig. Dist. 131 F. 780; Buskowitz v. Thompson, 144 Cal. 724; Thompson v. Allen Co., 115 U. S. 550; Merchants Nat'l Bank Assn. v. Escondido Ir. Dist. 77 Pac. 937; A. T. & S. F. Ry. Co. v. Reclamation Dist. 159 Pac. 430, 173 Cal.

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91; Thompson v. Perrus Ir. Dist. 116 F. 769; Board of Supervisors v. Thompson, 122 F. 869.) This district is bonded for upward of $500,000.00, with annual interest accruing in the sum of about $33,000.00, and since the bondholders are entitled to the remedy of mandamus in requiring the assessment and levy of a tax to pay the bonds as well as the interest thereon, the plaintiffs can have no standing in the present suit, wherein they asked the court to command the treasurer not to do the very act which this court would have been bound to command the treasurer to do whenever application should be made to it. It is contended that inasmuch as the district lands have been advertised in former years without bidders, the remedy is not adequate, but is futile and ineffective. It seems strange that this argument should be joined in by the representative of the district. The logical sequence of which is that a failure to realize the tax in one year or a series of years through a sale of property would be a justification for the wholesale and entire disregard of the only remedy provided by the statute for the collection of the debt. It is a favorite illusion of the plaintiff that somebody has "reached his hand into the cash box of the county" and taken the liberty of "paying the district debts with county money." If this suggestion has any foundation in fact, it is only necessary to point out that the county commissioners are the ones who have done the reaching and the paying. The treasurer cannot do so except upon command of the board. Reference is made to the county loaning its credit or making donations to the district, a feature of the argument already discussed that the legislature is powerless to require county officers to perform duties at county expense for the benefit of the district. The authorities cited and the reasons advanced in this brief are, we think, an adequate answer to the objection based on Constitutional grounds.

POTTER, CHIEF JUSTICE.

This action was brought by the Board of County Commissioners of the County of Albany, against Bernard

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Featherstone, the county treasurer of said county, to restrain and enjoin the defendant from advertising for sale, at the expense of the county, any of the lands within the Laramie Valley Municipal Irrigation District for delinquent taxes levied for the payment of interest upon the bonded indebtedness of said district, or for other district purposes. A temporary restraining order was granted, and subsequently by an amended petition said Irrigation District was made a party defendant, and specific relief was asked against it to reimburse the county for the expense of previous advertisements. A similar action having been commenced against the county treasurer and the district by C. P. Arnold, as a resident and taxpayer of the county, the latter was permitted to intervene in this action brought by the county, upon his petition filed in the other action. The treasurer and the district each appeared, the former filing a separate answer in each action. The answer of the district in the action brought by Mr. Arnold was, by written stipulation, received and considered as its answer in this case. The defendant Featherstone having been succeeded in the office of county treasurer by one H. Maynard, the latter, prior to judgment and upon his petition, was made a party defendant by order of the court, but not substituted for his said predecessor in office; his petition stating that he submitted himself to the jurisdiction of the court and consented to and requested an injunction restraining the publication of the delinquent district tax list at the expense of the county.

As the result of a trial there were special findings of fact and law apparently intended to dispose of the issues in both actions, and a judgment was entered declaring that the plaintiff and intervenor take nothing by their several actions and that the same be dismissed, that the defendant Featherstone, as treasurer, recover from them his costs, and that the restraining order be dissolved. The plaintiff and intervenor severally excepted to several of the conclusions of law and the refusal of the court to find upon the law as requested, and the defendant treasurer excepted to two findings of law. The plaintiff and intervenor have brought the case here on

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error, and the defendant treasurer has filed a cross-petition in error presenting his objections to the conclusions of law excepted to by him. The Irrigation District was made a defendant in error and has filed briefs herein, and the cause was heard upon the briefs of the several parties and also upon oral argument by counsel for each of them.

The particular cause or occasion for bringing the action when it was commenced, May 6, 1914, was the proposed inclusion of the lands in said irrigation district upon which taxes levied for that district were delinquent, in the publication in that year of the county treasurer's notice of the sale of realty for delinquent taxes, without providing for the expense thereof so as to relieve the county from liability therefor. The county treasurer is ex-officio collector of taxes, and such publication is required as to delinquent state, county and school district taxes during or previous to the first week in June in each year by Section 2413, Compiled Statutes of 1910, which declares also that the advertisement shall include the delinquent taxes for the preceding year or years. The notice is generally provided for by Section 2421, whereby the treasurer is required to give notice of the sale of real property for delinquent taxes by publication once a week for four consecutive weeks in a newspaper in his county, if there be one, stating the time and place of sale, with a list of the lands; and that section also provides that ten per cent upon the amount of the taxes due shall be added when lands are advertised. Another section (Sec. 2411) provides for a fee of one dollar for advertising property for sale for taxes to be charged by the treasurer, as tax collector, and collected from the taxpayer. (See McCague Inv. Co. v. Mallin, 170 Pac. 763.) Under the statute providing for the organization of irrigation districts, prescribing the powers and regulating the government thereof, all district taxes, whether to pay accrued or accruing interest or principal upon its bonds or to provide for the maintenance, operating, and current expenses of the district, are required to be levied by the commissioners of the county wherein the office of the district is located; the statute providing for an assessment of

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the lands in the district for that purpose by the county assessor, and a return by him to the county commissioners of the total amount of such assessment. (Comp. Stat., Secs. 845, 846, 847, 848.) Such taxes are declared to be special taxes. (Sec. 847.) The county treasurer is made district treasurer, and it is also provided that the county treasurer shall collect and receipt for all taxes levied for the district, in the same manner and at the same time as required for the collection of taxes on real estate for county purposes. That statute also declares that the revenue laws of the state for the assessment, levying and collection of taxes on real estate for county purposes shall be applicable, except as therein modified, including the enforcement of penalties and forfeitures for delinquent taxes. (Id. Sec. 850.) And it contains no provision modifying the provisions of the revenue law concerning the sale of land for delinquent taxes.

Originally, and until 1907, when the statute providing for the organization of irrigation districts was enacted, the duties of a county and its officers in the assessment, levy and collection of property taxes were confined to taxes for state, county and school district purposes, and we understand that it was the custom of the several counties to pay or advance the cost of publishing the delinquent tax sale notices, usually by its allowance as a claim against the county, awaiting reimbursement therefor through the subsequent collection of the taxes with the amount authorized to be added to cover such cost. (See Com'rs v. Chaplin, 5 Wyo. 74; 37 Pac. 370; State ex rel. v. McGibbon, Id. 82, 37 Pac. 373.) But there is no express statutory provision for paying the expense of such publication as to irrigation district taxes in advance of their collection by sale or otherwise, or for reimbursing the county for extra expense, if any, in the assessment or collection of such taxes. And that is no doubt chiefly responsible for the present litigation.

The foregoing statement of the statutory provisions, and what is not provided for, is made here to explain the situation when the action was brought, in view of which we suppose the parties to have acted in framing the pleadings

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and issues in the case. The facts are not in dispute, and might be stated by reciting the substance of the court's findings. But a brief reference to the pleadings seems advisable to show the grounds alleged for equitable relief, for both actions were brought as in equity and relief is prayed for under that branch of the court's jurisdiction.

The original petition alleged the due organization of the irrigation district under the statute providing therefor; the issuance of district bonds in the sum of $541,000, pursuant to the statute, constituting a lien upon the lands of the district; the fact that the county treasurer, the defendant for the four last preceding years, and prior to that period, in the year 1910, his predecessor in office, had advertised the lands in the district for sale to collect the accrued bonded indebtedness of the district, which had not resulted in any sale, because no one had bid for any of the lands, and none was bid in by the treasurer; that the cost of such advertising had been paid out of the county treasury for which the county had not been reimbursed; that the county board, by written resolution, in January, 1914, had directed the defendant treasurer not to advertise said lands for sale, and that the county would no longer pay therefor; that said defendant, without any assurance that the cost would be paid by some other means than out of the public revenue of the county, was again threatening to advertise such lands for sale, and without any application therefor; that defendant has no property out of which a judgment to reimburse the county could be collected; and that he threatens to increase the cost by duplicating the descriptions of the land by including those subject to the district taxes in a separate list. The prayer of that petition was for an injunction restraining the defendant "from advertising said lands for sale for the collection of any sum or sums of money arising out of any defaulted payments in said bonded indebtedness of the lands within said district, unless the expense thereof be provided for by a "proper guarantee or deposit of the expense." There was also a general prayer for all other proper relief.

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The amended petition contains substantially the same allegations, but alleges that the defendant was again proceeding to advertise the district lands at the expense of the county, acting as county treasurer and ex-officio collector of taxes and not as district treasurer; that such advertisement was without authority of law and in excess of defendant's power, and would involve the county in a multiplicity of suits without remedy to recover the expense incurred for the reason that the irrigation district is insolvent and without funds from which such expense could be recovered. That the defendant claiming such expense to be a charge against the county, has caused bills to be presented against it for such advertising in previous years which were erroneously and improperly allowed by the commissioners, upon the demand of the newspaper which published the same. That the defendant has not paid any of such expense out of district funds or otherwise, and refuses to apply the funds in his hands as district treasurer toward the payment thereof. That such expense has increased from year to year, causing a waste of public funds; that the total cost during the several preceding years was $1,353.66, and that the threatened publication in 1914 would cost $787.18. That the bonded indebtedness of said district exceeds four per cent of the assessed value of the land therein, and is void. That the district is the owner of valuable irrigation works outside its exterior boundaries which are not assessed. That the bonds are a lien upon all the lands in the district reserved by the personal contract of the vendor and vendees thereof. That the expense to the county in keeping the books of the district and attempting to collect the taxes due upon its bonds and for the management of said enterprise equals the expense of assessing and collecting all state and county taxes in the county, requiring the employment of deputy treasurers and assessors and an extra expense of more than one hundred dollars a month.

The prayer of that petition is for a temporary restraining order, that on final hearing the defendants be perpetually enjoined from advertising said lands except at the cost and

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expense of the irrigation district; that an accounting be had between the district and the county as to the money already paid for advertising said lands for district debts and charges; that the said defendant Featherstone, as treasurer of the district, be required to pay the county the sum already paid for such advertising, with interest. That said sum with interest thereon be declared to be a lien upon all of the property of the district superior to the lien of the bonds; that the said bonds be declared null and void so far as constituting a municipal or public charge, and that the county treasurer and ex-officio collector of taxes, and the county assessor, be enjoined from keeping the books of said district, and from collecting or attempting to collect, either the principal or interest upon said bonds, or the expense for the maintenance of said district. And such other and further relief as the plaintiff may be entitled to in the premises. The petition in the intervenor's action contains similar allegations, and prays the same relief.

That the lands in said district upon which there were delinquent district taxes had been advertised and offered for sale during the years 1910 to 1913, inclusive, and that it was again proposed in 1914 to publish a similar notice is admitted by the pleadings; also that the expense of previous publications had been paid by the county, as alleged in the amended petition; that district bonds had been issued in the amount alleged; that interest had accrued thereon during the several years, that certain defaults had occurred in the payment thereof, and that none of the advertised lands had been bid in by the treasurer. It was further admitted that the lands to be offered for sale for delinquent district taxes were advertised in a list separate and distinct from the lands to be offered for delinquent state, county and school district taxes, resulting in some instances in a duplication of descriptions. But the defendant alleged: That the assessment roll and tax list prepared for said district were necessarily separate and distinct from the assessment roll and tax list for state, county and school taxes, and separate and distinct warrants were delivered to the treasurer in each year for the collection

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of the district tax, and that by advice and direction of the board of county commissioners the said lists were kept separate to avoid making the county chargeable with the payment of the district taxes either by bidding in the lands at the tax sale or otherwise. As there was no reply, the alleged fact that the delinquent district taxes were advertised in a separate list by the advice and direction of the county board stands admitted.

The answer of the irrigation district, which is here only as one of the papers filed in the action brought by Mr. Arnold, together with other papers certified to by the clerk of the district court, as papers filed in that action, contains certain admissions and denials, referring to the petition in that action, which we think unnecessary to recite, except the denial that the expenses of the several publications of the delinquent district tax list were improperly and erroneously allowed as claims against the county, and the averment that if such expenses were legal they were a proper charge against the county and not against the district. Further, in that connection, said answer admits that the expense had increased from year to year, and alleges that continuing to advertise the sale of the lands for district taxes is a useless waste of public money, and that the county treasurer and his successors should be permanently restrained therefrom. Said answer further alleges that the district money in the hands of the county treasurer was collected by taxation for the operating expenses of the district, and that the treasurer is without authority to divert the same from the purposes for which it was raised or to apply it upon any indebtedness caused by advertising the delinquent tax list. And the district, by its said answer, joined with the plaintiffs in asking that the treasurer be restrained from publishing the said delinquent list for 1914 and subsequent years.

It is unnecessary to recite the evidence, since the facts are not disputed, and for the further reason that all of the evidence is not in the record here; the bill of exceptions disclosing that at the conclusion of the testimony an agreed

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statement of facts was offered, which is not embraced in or attached to the bill, and no such statement is found among the papers in this case. One of the papers certified as having been filed in the other action purports to be an agreed statement of facts between the plaintiff therein and the irrigation district, and is marked as filed in that action on May 1, 1915. And another paper sent here with the papers in that case purports to be an agreement between counsel representing the plaintiff in this case and the defendant treasurer as to the facts admitted by the pleadings. But neither of those papers is identified as the agreed statement offered in evidence in this case.

At the request of the intervenor, the court stated in writing its findings of fact and conclusions of law. The court found, among other facts not necessary to state because of the admissions of the pleadings, the following:

That the costs of the previous publications during the years 1910 to 1913 inclusive, paid by the county, was $1,-353.66. That it had increased from year to year, and that to publish the notice prepared for publication in 1914 would cost $787.18. That no part of the money so expended by the county had been returned to the county treasury, except the sum of $120.15, which was collected through the redemption of lands sold. That $189.91 penalties and interest on lands sold and redeemed had been turned into the irrigation district fund. That there had been an annual increase in the delinquent list. That the treasurer kept no separate list distinguishing the sales for irrigation district taxes from sales for state and county taxes. That the treasurer was proceeding as county treasurer to advertise certain lands as in former years when he was restrained by the order of the district court commissioner. That no land was sold at any of the advertised sales for district taxes except a few town lots in 1912 and 1913, and one acreage tract in 1913. That neither the bond holders nor the irrigation district had requested the publication of either notice, or made any provision for paying the cost of such publication. That there was in the hands of the defendant Featherstone at the time

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of filing his answer the sum of $1,700 belonging to the district and that of said sum there remained in the hands of his successor $220 belonging to the bond account and $1,-441.41 belonging to the district maintenance fund.

There was no exception to any finding of fact. But, as recited in the findings, the court denied the request of the intervenor to find as a fact that the advertisement and re-advertisement of the list of irrigation district lands for delinquent district bond assessments was futile and a waste of money, to which the intervenor and the district excepted.

The intervenor requested findings upon the law substantially as follows: 1. That the diversion of county funds for paying the cost of said advertising is illegal. 2. That such expense is a proper charge against the irrigation district and not an expense to be paid out of county funds raised by general taxation. 3. That the irrigation district is liable to reimburse the county for the money expended in the publication of said delinquent list. 4. That the defendant Featherstone, county treasurer, must reimburse the county for the money so expended. 5. That the bonded indebtedness of the district does not constitute a public charge upon lands and property outside of the district, and that the direct or indirect use of county funds either in payment of such indebtedness or in an attempt to collect the same is illegal. 6. That the district must bear its own financial burden in advertising delinquent lands for sale in the management of district affairs, without calling on the county. 7. That a levy to raise a fund for the payment of irrigation district bonds, or other district purposes, is not strictly a tax. The court refused the requests, reciting them, and stating the refusal to so find in paragraphs numbered one to seven, inclusive, of the conclusions of law, and to the refusal of each request the intervenor excepted.

The conclusions of law were stated in paragraphs eight to twelve, inclusive, under that head substantially as follows: 8. That the restraining order should not have been granted, and should be dissolved, and this action dismissed at the cost of the plaintiff. To that finding the plaintiff excepted.

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9. That it is the duty of the county treasurer, when causing a notice of lands for defaulted irrigation district taxes or assessments to be published (the necessity of which the court did not pass upon) to publish said notices of sale at the expense of the county, the county to be reimbursed therefor in the same manner as when sales of realty are advertised for delinquent county or state taxes. To that finding the plaintiff and intervenor severally excepted. 10. That the general provisions of the statute for the sale of lands for delinquent county and state taxes govern the sale of lands within an irrigation district for delinquent special district taxes, including taxes to pay district bonds. And to that finding, so far as it relates to the officials of the county in their capacity as county officers, the expenditure of public moneys of the county, and the classification of installments due under the district bonds as taxes, the plaintiff and intervenor severally excepted. 11. That the general revenue laws of the state providing for the sale of lands for delinquent county taxes is applicable to the collection of defaulted payments on irrigation bonds and irrigation assessments, and it is the duty of the county treasurer to bid in the lands not sold for district taxes for lack of bidders, and that the county has a statutory lien thereon for the costs incurred by the county in advertisements for the same, prior and superior to any other lien, whether created prior or subsequent to the sale. To the part of that finding requiring the county treasurer to bid in the lands the plaintiff and intervenor severally excepted. And to the part relating to a lien in favor of the county the defendant Featherstone excepted. 12. That the duty of the county treasurer to so bid in the lands is ministerial and attaches by operation of law, and that all lands not sold for want of bidders are as a matter of law deemed to have been bought in by the county and should be placed upon a separate list and not re-advertised; said finding being expressly limited to district assessments and defaulted interest on district bonds. To that finding the defendant Featherstone excepted, and to so much of it as applies to assessments for district maintenance tax the

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district excepted. The court refused to find as a matter of law that the county is entitled to penalties and interest, or that the county is entitled to recover from the irrigation district the amount of penalties and interest collected and turned over to the district. And to that the plaintiff, county and intervenor severally excepted.

The several refusals to find upon the law as requested are assigned as error, the refusal of each request being separately assigned; also the conclusions of law that the sale of lands for delinquent irrigation district taxes is governed by the general statute regulating the sale of realty for county and state taxes, and that the action should be dismissed at plaintiff's cost. And it is further claimed by the petition in error that the judgment is contrary to law; that the court erred in vacating the restraining order and refusing a permanent injunction, in overruling the motions of the respective plaintiffs in error for a new trial, and not entering judgment for plaintiffs on the findings of fact. The defedant Featherstone's cross-petition in error alleges error in the 11th and 12th conclusions of law.

It will be observed from the foregoing that the principal question sought and intended to be litigated is the liability of the county for the expense of publishing the tax collector's notice of the sale of lands for delinquent irrigation district taxes. But we are met at the threshold with the question whether the case is a proper one for the exercise of equitable jurisdiction. Nothing concerning the fact of the levy of the district taxes aforesaid or the assessment therefor is alleged in the petition in either action or shown by the evidence, and we must therefore assume that such taxes were duly levied as required by the statute. The irrigation district statute provides that the county treasurer shall be liable upon his official bond and to indictment and criminal prosecution for malfeasance, misfeasance, or failure to perform any duty therein prescribed. (Comp. Stats. 1910, Sec. 849.) Thus the case presents this situation: That the county board having performed its duty under the statute by levying the taxes thereby required, is seeking to enjoin

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the treasurer from performing the duty of collecting such taxes, imposed upon him under the statutory penalty aforesaid; and upon the seemingly anomalous ground of preventing the use of county funds in paying the expense of an act required of him in performing that duty, for which, it is alleged and contended, the county is not liable.

If such expense is not legally chargeable against the county, then the matter is entirely within the control of the county board, unless suit should be brought to recover the amount from the county, for the board may refuse to allow or pay any claim therefor when presented; and if suit should be brought upon the claim the fact that it was not a proper charge against the county would constitute a complete defense. Upon the averments of the petition and the contentions denying the county's liability for such expense, therefore, there is not only no necessity for an injunction, but there is an adequate and complete remedy at law. If the county is bound to pay such expense, then, as to the ground denying such liability, neither of the plaintiffs would be entitled to an injunction.

Neither the county nor the intervenor, upon the facts, is in a position which would allow them to prevent the collection of the taxes in question, through the aid of an injunction. It is not alleged or shown that either is the owner of any land proposed to be advertised by the treasurer's notice, or of any property subject to a tax levied for the irrigation district. Nor does it appear that they have any interest in the matter of the collection of the district taxes, except to prevent or avoid the incurring of a county liability for the expense of publishing the notice aforesaid, or the use of county funds in paying such expense. The general rule is that one who does not own real estate which it is sought to subject to a tax, and who is not, therefore, liable to the tax, will not be allowed the aid of an injunction to prevent its enforcement, and that an action to enjoin a tax should be brought by the taxpayer or taxpayers affected by it. And upon that principle the county could not maintain an action to enjoin generally the collection of these taxes, nor could

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the intervenor do so for he sues not in the interest of any one liable or sought to be made liable to the tax or whose property is sought to be made subject thereto, but in the interest of the county or such general taxpayers as are interested only in the use of county funds to enforce the tax. (1 High on Inj., 4th ed., Sec. 573; 2, Joyce on Inj., Secs. 1228, 1229; Board of Education v. Guy, Co. Auditor, 64 O. St. 434 (60 N. E. 573); State, ex rel. Ewing, et al., v. Board of Education, 72 Mo. 436; Village of Nunda v. Village of Chrystal Lake, 79 Ill. 310; Stiles v. City of Guthrie (3 Okla. 26), 41 Pac. 383; Center Township v. Hunt, 16 Kan. 430; State, ex rel. v. McLaughlin, Co. Treasurer, 15 Kan. 228, 22 Am. Rep. 264.)

In State v. McLaughlin, supra, a suit in the name of the state to restrain a county treasurer from collecting certain school district taxes, the Kansas Supreme Court, by Brewer, Justice, said:

"It is obvious that the state as a state has no direct interest in this controversy, any more than in a controversy between individuals. The payment of these bonds may be illegal, but their payment works no greater wrong to the state than the payment by a single individual of an illegal debt. The single individual may, if he chooses, by appealing to the ordinary proceedings of the law, protect himself against such illegal payment. So may the many taxpayers. * * * As private citizens, unless specially authorized, may not interfere to compel the performance of a mere public duty, or restrain the doing of a mere public wrong, so the state, having no direct interest, may not interfere to protect individuals from the illegal acts of a public officer where such individuals have, in the ordinary course of the law, ample and adequate means of protection." And in Center Township v. Hunt, supra, the same court said:

"Now suppose they (township bonds) are invalid, still the plaintiff (the township) has no right to enjoin the tax levied upon the taxable property of the various individuals of the township to pay the interest on them. If any tax should be assessed against the plaintiff, the plaintiff might

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then perhaps maintain an action to enjoin the tax. But it cannot maintain an action to enjoin a tax assessed against the other taxpayers of the township. One taxpayer cannot enjoin a tax levied against another taxpayer. Each taxpayer must sue for himself, either in an action brought by himself alone, or in an action brought by himself and others with like interests." In the Oklahoma case of Stiles v. City of Guthrie, supra, the city joined with certain residents and taxpayers of the city in an action to enjoin the county treasurer from collecting an alleged illegal tax. The court said:

"The city of Guthrie had no interest whatever in the subject matter of this action. There is no allegation that it had any property which was subjected to this illegal tax, or against which it is claimed that the illegal tax was a lien, and was attempted to be enforced; nor do we know of any law in this territory under which this tax could be a lien against the property of a public corporation, such as a city devoted to public use. * * * The city of Guthrie has no more interest in the question as to whether or not a property owner shall pay an illegal county tax than some other city in the territory, or any of the states would have. The property owner may, in fact, be a resident and citizen of one of these other cities, and the city is under no moral or legal obligation to look after his private interests."

In the Ohio case cited, Board v. Guy, a township board of education sought to enjoin the collection of a tax, levied by the commissioners of the county for the purposes of a newly created joint subdistrict, on the ground that the proceedings for the creation of such district were irregular and void. It was held that the plaintiff board had no right to maintain the action. The court said:

"It is true that the board of education is made by statute a body corporate with capacity to sue and be sued; but capacity to sue is one thing, and right to maintain a particular action is another thing. The plaintiff has no right to maintain this action, and the second ground of demurrer is well taken; and might probably have been raised without

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demurrer. * * * A board of education is not a taxpayer; taxes may be levied for its benefit, but it pays none. It has, then, no interest in the subject of the action, nor is it a part of its duty to prosecute it."

In School District v. Commissioners, 15 Wyo. 73, 86 Pac. 24, 11 Ann. Cas. 1058, this court held that a county board had no interest which would enable it, on the ground that a school district in the county was illegally organized, to maintain an action to enjoin the county treasurer from paying to such district moneys collected as taxes levied for the purposes of the district.

The court's refusal to find as a fact that the advertisement of the lands for delinquent taxes was futile and a waste of money is not assigned as error, and does not seem to be insisted upon, for, although referred to as an averment of the petition, it is not discussed in the brief of plaintiffs in error. But the failure to sell the lands offered at former sales for taxes of preceding years, owing to a lack of bidders, if alleged as an independent ground for injunction, would have but little, if any, force. It would not necessarily follow from that fact that there would be no bidders at the sale proposed to be advertised or any future sale under a like notice. And we do not think the court could assume that there would be none. But if such fact could be assumed, or if established by proof, which would obviously be difficult, if not impossible, the court would not, in our opinion, be justified in enjoining on any such ground an act of the tax collector required by statute as one of the steps provided for the enforcement of a tax. The remedy for such a condition, if not already provided by the statute, is for the legislature to prescribe. Notwithstanding a similar condition in Colorado, viz: a lack of purchasers for lands offered at tax sales, and an increasing number of delinquent tax payers from year to year, it was held that bondholders were entitled to mandamus to compel a levy against the lands of an irrigation district to satisfy a judgment upon interest coupons. (Norris v. Montezuma Valley Irr. Dist., 248 Fed. 369.)

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Although the injunction is prayed for in a conditional form, its effect, if granted in that form, viz: restraining the publication at the expense of the county, or unless other means should be provided for paying the cost of the publication, might be to prevent the collection of the delinquent district taxes. That was the effect of the restraining order issued at the commencement of the action for it was unqualified, and also directed the treasurer to withdraw from publication any advertisement that may have been handed to a newspaper for that purpose. And unless the statute provides for meeting the expense prior to its collection from taxpayers or upon tax sales, without the use of county funds, the effect of an injunction restraining publication at the expense of the county would probably be the same as an injunction absolute in form. In view, therefore, of the possible effect of the injunction applied for and the confusion it would cause in the collection of the delinquent taxes, the action in that respect should be considered, we think, as an attempt by aid of injunction to prevent the enforcement of such taxes, and as within the rule above stated denying to one in the position of the county or the intervenor the right to an injunction for that purpose.

The statute provides that bonds of an irrigation district and the interest thereon shall be paid by revenue derived from an annual assessment upon the real property of the district, and that such property shall be and remain liable to be assessed for such payments in the manner therein provided. It provides for an assessment and levy in each year as above stated for the purpose of raising such revenue, and for the collection of the taxes by the county treasurer, and declares that for such purposes the revenue laws of the state for the assessment, levying and collection of taxes on real estate for county purposes, except as therein modified, shall be applicable, including the enforcement of penalties and forfeitures for delinquent taxes. Having levied the taxes which the treasurer was proceeding to enforce, the county board should not be heard to question his right to proceed in the manner provided by the statute. Certainly

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not, on the ground alone that the county might be required to pay the expense or that it might lay the foundation for a claim and suit against the county therefor. If the county is legally liable for such expense it is because the obligation is created by the law, as a result of a proceeding provided for and commanded by the statute, rather than by the treasurer, who is given no discretion as to whether the lands shall or shall not be advertised for sale. If the county would not be liable for the expense, the fact that a claim might be presented against it therefor, or that it might be sued thereon, would not cause a multiplicity of suits giving a court of equity jurisdiction. Indeed, a single suit would dispose of the matter.

Leaving out the question of the propriety of granting an injunction affecting the collection of taxes levied for the benefit and protection of bondholders in an action where no bondholder is a party, which might well be considered if necessary, we fail to find upon the allegations or the facts any ground for injunction, or, as between the plaintiff or the intervenor and the defendant treasurer, any ground for equity jurisdiction.

The plaintiffs in error are not in any better situation upon their demand for relief against the irrigation district, with respect to this question of jurisdiction. If the district is indebted to the county for the money voluntarily paid upon claims alleged to have been erroneously allowed for publishing the delinquent district tax list with the tax sale notices of previous years, the amount is recoverable at law, and as conveniently as in equity. An accounting is prayed for, but the facts do not present a case for an accounting in equity as the only relief to be granted. It is not a case of mutual and complicated accounts. The account, if any, is all on one side and consists of four items of money paid. No discovery is sought and there is nothing to show that a discovery is required. Nor is the demand for an accounting aided by any other equitable relief in the cause. There seems to be nothing inherent in the situation, and nothing is disclosed, that would prevent the matter from being as fully

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investigated at law as in equity. (1, Storey's Eq. Jur. (Redf. ed.), Secs. 458, 459; 4 Pomeroy's Eq. Jur. (3rd ed.), Secs. 1420, 1421; 1 C. J. 612-616.)

For the reasons stated, neither of the plaintiffs in error, the original plaintiff and the intervenor, have any right to maintain the action. And, therefore, without considering any other question presented in the case, the judgment will be affirmed on the jurisdictional ground aforesaid.

Affirmed.

BEARD, J., and BLYDENBURGH, J., concur.

BABBITT v. STATE.

(No. 923; Decided August 17th, 1918; 174 Pac. 188.)

ELECTIONS—PRIMARY ELECTIONS—DEFACEMENT OF BALLOT—INDICTMENT AND INFORMATION—CERTAINTY OF ALLEGATIONS—INTENDMENT OR IMPLICATION—OFFENSES—SUFFICIENCY OF INDICTMENT.

1. Compiled Statutes, 1910, Section 2310, prescribing a penalty for the defacement or destruction of a ballot, was originally enacted as a part of Laws, 1890, Chapter 80, relating to general elections, and is confined in its operation to violations of that statute. It does not apply to the defacement or destruction of a ballot used at a primary election for the selection of party candidates, held under Laws, 1911, Chapter 23, since the latter statute specifically defines what acts shall constitute a violation of its provisions.
2. It is the general rule that the want of a direct, positive, and material allegation in the description of the substance, nature, or manner of the offense, cannot be supplied by any intendment, argument, or implication.
3. Under Compiled Statutes, 1910, Section 6173, providing that an indictment charging an offense against election laws, and alleging that the election was authorized by law, was sufficient, without stating names of officers holding the election, persons voted for, and offices to be filled, an indictment that does not state names of officers holding election, persons voted for, and offices to be filled, is insufficient, if it does not allege that the election was authorized by law.

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ERROR to District Court, Laramie County, HON. WILLIAM C. MENTZER, Judge.

Orren C. Babbitt was convicted of defacing election ballots and he brings error.

H. Donzelmann, for plaintiff in error.

The indictment is insufficient and fails to charge an offense under the laws of the State. Where the definition of an offense includes generic terms, it is not sufficient to charge the offense in the terms as in the definition, but it must state the species. (Archibold Crim. Pract. & Pleading, Vol. 1, p. 291; U. S. v. Cruckshank, 92 U. S. 544-548; Com. v. Filburn, 119 Mass. 297; U. S. v. Carll, 105 U. S. 611; McCann v. U. S., 2 Wyo. 274-296; 22 Cyc. 340; Wilcox v. State, 166 Pac. 74; McGinnis v. State, 16 Wyo. 72; Ellers v. State, 25 Ohio State Rep. 388; Wrights Rep. Vol. 1, p. 483; Dillingham v. State, 5 Ohio State Rep. 284-285; U. S. v. Potter, 56 Fed. 89; U. S. v. Cook, 17 Wallace (U. S. S. Ct. Rep.) 174; Williams v. State, 12 Tex. Court of Appeals, 395-401.) The scienter must be alleged and proven. (U. S. v. Slenker, 32 Fed. Rep. 691-695; U. S. v. Carrl, 105 U. S. Rep. 611-612.) It is only when the statute sets forth all the elements of the offense that an indictment or information in the language of the statute is sufficient. (McGinnis v. State, 16 Wyo. 72.) If the indictment or information does not charge facts constituting a crime, it will not be aided by intendment or implication. (State v. Jamison, 81 N. W. 594; State v. Potter, 28 Ia. 554.) The information in the present case does not allege that the election was authorized by law and is therefore insufficient. (Section 6173 Comp. Stats. 1910.) It should allege that there was an election lawfully held. (Ex parte Rodiguez, 39 Tex. Rep. 705; Tipton v. State, 27 Ind. 492-493; Newel v. Commonwealth, 2nd Wash. Va. 88; Reg. v. Vaile, 6 Cox C. C. 470; Reg. v. Hagne, 4 B. & S. 715.) A lawful ballot is defined by statute. (Comp. Stats. 1910, Sections 2180-2185.) No other ballots may be counted. (Section 2187 Comp. Stats.) Official ballots are defined by statute. (Laws 1911, Chapter 51, Section 8.) The infor-

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mation does not charge an offense and the point was properly raised by motion in arrest. (McGinnis v. State, supra; Hoover v. State, 110 Ind. 349.)

D. A. Preston, Attorney General, and
Wilfred O'Leary, Deputy Attorney General.

The information charges an offense under Section 2310, Comp. Stats. 1910; it follows the language of the statute. The statute states all of the essential elements of the offense. An information in the language of the statute is sufficient. (14 R. C. L. 185; Cook v. State, 11 Ga. 53; Whiting v. State, 14 Conn. 487; Dickhant v. State, 85 Maine 451; Simmons v. State, 12 Mo. 268; Hess v. State, 5 Ohio 5, 11 L. R. A. 530; State v. Smart, 55 A. D. (S. C.) 683.)

Sam M. Thompson, County and Prosecuting Attorney, for Defendant in Error.

The word "deface" is not a generic term and, particularly as to the means of defacement, was unnecessary. (State v. Mundy, 2 Marv. (Del.) 429, 43 Atl. 260; Phelps v. People, 72 N. Y. 334; Pay v. Com. 55 S. W. 687, 21 Ky. L. Rep. 1562; State v. Tisdale, 39 La. Ann. 467; 2 So. 406; State v. Mass, 37 La. Ann. 292; State v. George, 93 N. C. 567; State v. Blease, 1 McMull (S. C.) 472; State v. Cantrell, 2 Hill (S. C.) 389; U. S. v. Hill, 28 Fed. Cases No. 16,730, Baldwn. 78.) It is unnecessary to explain in the information the meaning of words used in the statute. (Sterne v. State, 20 Ala. 43.) Matters of necessary inference need not be alleged. (Com. v. Caldwell, 14 Mass. 330; 22 Cyc. 303-304.) The exception could only be taken by motion to quash. (Wilbur v. Territory, 3 Wyo. 268; McGinnis v. State, 16 Wyo. 72; Koppala v. State, 15 Wyo. 398; Patrick v. State, 17 Wyo. 115.) The rule is that where a particular knowledge is essential to the commission of an offense, scienter must be averred unless the statement of the act itself implies knowledge of its illegality. (32 Cyc. 327-328; Stein v. State, 37 Ala. 123; State v. Graham, 38 Ark. 519; Com. v. Stout, 73 Mon. 247; Birney v. State, 8 Ohio 230.) Section 6173, Comp. Stats. 1910, does not require an allega-

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tion in cases of this character, that the election was authorized by law, but simply says such allegations shall be deemed sufficient. It makes no special reference to Section 2310, Comp. Stats. 1910. The language of the statute was followed in framing the information and, in addition, it was charged that the defaced ballots had been voted at the primary election held in said county and State on the 22nd day of August, 1916. This would seem a reasonable compliance with the rule. It is unnecessary to allege that the ballots were official ballots, since we have in legal effect stated that said ballots were official ballots, as only official ballots can be voted at a primary election. (Section 2214, Comp. Stats. 1910, subdivisions 1, 5, 17, 18 and 20; Sections 2229, 2231 and 2234, Comp Stats. 1910; Section 2187, Comp. Stats. 1910; Session Laws 1911, Chap. 51, Sec. 8.) All facts necessary to constitute the offense must be charged. (22 Cyc. 293.) We believe the information in the case at bar comes within the requirements and states every act necessary to constitue a valid charge under Section 2310, Comp. Stats. 1910.

BEARD, JUSTICE.

A criminal information was filed by the County and Prosecuting Attorney of Laramie County, in the district court of said county, in which information the plaintiff in error, Orren C. Babbitt, was charged as follows: (Omitting the formal parts) "that Orren C. Babbitt, late of the county aforesaid, on the 27th day of August, A. D. 1916, at the county of Laramie, in the State of Wyoming, did unlawfully and wilfully deface twenty ballots, which prior to being so defaced had been voted at the primary election held in said county and State on the 22nd day of August, A. D. 1916, contrary to the form of the statute," etc. He entered a plea of not guilty, and upon trial the jury returned a verdict of guilty. A motion for arrest of judgment on the ground that the facts stated in the information do not constitute an offense under the laws of the State of Wyoming was duly filed, was, by the court, denied, and judgment imposing a fine and imprisonment entered. A motion for a new trial

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assigning as error the denial of the motion for arrest of judgment and other grounds, not necessary to be here stated, was duly filed, which motion was also, by the court, denied. Plaintiff in error (defendant below) brings error.

The only question presented to this court for determination is whether or not the facts stated in the information are sufficient to constitute an offense punishable under the laws of this State. The section of the statute claimed by counsel for the State to have been violated is section 2310 of the Compiled Statutes of 1910, which reads as follows:

"Any person who shall falsely make or wilfully deface or destroy any certificate of nomination or nomination paper, or any part thereof, or any letter of withdrawal, or sign any such certificate or paper contrary to the provisions of the election laws of this State, or who shall file any certificate of nomination or nomination paper or letter of withdrawal, knowing the same or any part thereof to be falsely made, or who shall suppress any certificate of nomination or nomination paper, or any part thereof, which has been duly filed, or who shall forge or falsely make the official endorsement on any ballot, or who shall wilfully destroy or deface any ballot, or who shall wilfully delay the delivery of any ballots, shall be fined not exceeding one thousand dollars or be imprisoned in the county jail not more than one year, or both."

This section is found in Chapter 155, Comp. Stat. 1910, which chapter, together with chapters 143, 146, 147, 148, 149, 150, 151, 152, 153 and 154, as numbered in said Compiled Statutes, provide for and treat of general elections. Chapter 144 provides for special elections, and chapter 145 provided for the manner of calling and conducting conventions or primary meetings prior to the adoption of the primary election law in 1911, and which convention or primary meeting was defined, "an organized assemblage of electors or delegates representing a political party." (Sec. 2114, Comp. Stat.) Nothing contained in either of those chapters was or is applicable to the primary election at which the ballots alleged to have been defaced were voted. As originally enacted, the subjects embraced in the above stated chapters

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were included in one Act, being chapter 80 of the Session Laws of 1890, entitled "An Act concerning elections and for other purposes." The first section of which provided, "There shall be held in the several voting precincts of Wyoming on the Tuesday next after the first Monday in November, in the year eighteen hundred and ninety, and on the Tuesday next after the first Monday in November, in each second year thereafter, a general election, at which the following officers shall be elected" (specifying the officers to be elected at such election). Said chapter 80 contained one hundred and eighty-four sections, and provided for the conducting of such general election, defining what should constitute offenses under the act, and prescribing the penalties therefor, among which were those included in section 170 of the act, which is now said section 2310, Comp. Stat. Said chapter 80, S. L. 1890, has been amended, and other provisions added thereto from time to time, but the time for holding the general election and the provisions of said section 170, remain unchanged; and it is clear that the ballot, the defacing of which was made a crime, was and is the ballot provided for and voted at such general election. It may be argued that the words "any ballot", as used in section 2310, when taken in connection with the language, "Contrary to the provisions of the election laws of this State," as it appears in the Compiled Statutes, is broad enough to include a ballot voted at a primary election. But the last quoted language is not the law as it was written by the legislature. In said section 170, it is "contrary to the provisions of this act," and specifically limits the offenses therein defined and the penalties imposed to violations of that act which treats of the general election in November only. The change in the wording of that section seems to have been made by the revisers in 1899, and by the compiler in 1910; but such changes so made can not affect the plain meaning and application of the law as written by the lawmakers. The election at which the ballots alleged to have been defaced were voted was not such an election as is therein defined, but was a primary election for the selection of candidates by the re-

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spective political parties as provided for by Chapter 23, S. L. 1911, and the amendments thereto. That act is entitled, "An Act providing for and regulating the holding of primary elections and nominations for office, and the government of political parties and organizations." While that act provides for the holding of the primary election of the several political parties at the same time and by one set of officers, it is a separate election of such parties. Separate ballots for each party are required and are to be printed on different colored paper, and no one affiliated with one party is permitted to vote the ballot of any other party. It provides for the time of holding and the manner of conducting such primary election, but does not declare or provide that the penalties imposed for violations of the general election law shall apply to like violations of the primary law; but, on the contrary, it specifically, in sections 51 and 52 of the act, defines what acts by public officers or any other person shall constitute a violation of its provisions, and prescribes the punishment therefor; and it is significant that the defacing of a ballot is not one of the numerous acts therein prohibited, or for the doing of which a penalty is imposed. The legislature having specifically defined what should constitute a violation of that law and having prescribed the penalty therefor, excludes the idea that it intended to include other acts not mentioned. However necessary or desirable such a provision might be, it is for the legislature and not the courts to determine. We are, therefore, of the opinion that section 2310, Comp. Stat. 1910, has no application to the primary election described in the information. Our conclusion finds more or less support in the following cases: George v. State, 18 Ga. App. 753, 90 S. E. 493; Mark v. State, id.; State v. Simmons, 117 Ark. 159, 174 S. W. 238; State v. Hass et al., 142 La. 271, 76 So. 710; People v. Foster, et al., 60 Misc. Rep. 3, 112 N. Y. Supp. 706; State v. Woodruff, 68 N. J. L., 89, 52 Atl. 294; Commonwealth v. Helm, 9 Ky. 532; Hodge v. Bryan, 149 Ky. 110, 148 S. W. 21; Dooley v. Jackson, 104 Mo. App. 21, 78 S. W. 330; State v. Chichester, 31 Neb.

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325, 11 L. R. A. 104; Commonwealth v. Wells, 110 Pa. St. 463, 1 Atl. 310.

It is contended that if said section 2310 applies to primary elections the information is fatally defective for want of material averments. It does not allege that the primary election at which the ballots charged to have been defaced were voted was an election authorized by law, and no facts are stated so showing. "It is a general rule that the want of a direct, positive and material allegation, in the description of the substance, nature or manner of the offense cannot be supplied by any intendment, argument or implication." (Joyce on Indictments, Sec. 246 et seq., and authorities cited in the notes.) In charging an offense against the election laws, it is necessary either to state the facts showing that the election was one authorized by law by stating the names of the officers holding the election, the persons voted for and the offices to be filled at such election, or to allege that such election was authorized by law. Section 6173, Comp. Stat. 1910, providing, "When any offense shall be committed in relation to any election, an indictment for such offense shall be deemed sufficient if it alleges that such election was authorized by law, without stating the names of the officers holding the election, or the persons voted for, or the offices to be filled at such election." That implies that if those facts are not alleged the indictment will be insufficient unless the substituted averment specified in the statute is used. The information in this case is also lacking in direct and positive allegations in other respects; but as we have already held that the section of the statute under which it was drawn is not applicable to such an election as is attempted to be described in the information, it is not necessary to pursue that question further. For the reason stated, the judgment of the district court is reversed and the cause will be remanded with direction to vacate the judgment; and, as no crime punishable under the statute is charged, to discharge the defendant.

Reversed and remanded with directions.

POTTER, C. J., and BLYDENBURGH, J., concur.

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KING v. BEAUMIER.

(No. 868; Decided September 6th, 1918; 174 Pac. 612.)

TRIAL—SEPARATE COUNTS—VERDICT OF EACH COUNT MUST BE SUSTAINED BY EVIDENCE—APPLICATION OF PAYMENT—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—COMPETENT ADMISSIONS BY PARTY TO THIRD PERSON—CUMULATIVE EVIDENCE.

1. Where plaintiff in action for services stated his case in separate counts, each purporting to state a separate and distinct cause of action, the verdict on each count must be sustained by evidence as if there were separate actions, and it is not enough that it supports some verdict, but it must support that actually rendered.
2. Where plaintiff sued in eight counts for services rendered, aggregating nearly $6,000, admitting unapplied credit of $1,765, which exceeded the amount of the two first due counts, verdict for plaintiff on such counts could not be sustained, since the credit must be applied to the amounts first due.
3. Newly discovered evidence which plaintiff in error could not have discovered by reasonable diligence before the trial and was without knowledge until after the trial, as to admissions made by his adversary to a third person, that the transaction in suit was a losing partnership and that he had agreed to perform services at nominal pay as his share of the loss, was competent as contrary to the theory of the petition.
4. In an action for services where there is a dispute as to what the contract was, newly discovered evidence of admissions of the party to a third person that the contract was different from that testified to by him, or was as claimed and testified to by the other party, is evidence of a different character and not merely cumulative so as to warrant refusal of a new trial.

ERROR to District Court, Albany County, HON. V. J. TIDBALL, Judge.

Action by Victor Beaumier against Herbert King. Judgment for plaintiff, and defendant brings error.

Stephen C. Downey and Cassius M. Eby, for plaintiff in error.

The evidence shows the existence of a partnership between the parties to this action and that defendant in error

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performed services for plaintiff in error to compensate certain losses in a partnership undertaking. The evidence fails to support the verdict and judgment as rendered, and the same should be vacated. (Fieldhouse v. Leisburg, 15 Wyo. 207; U. P. R. R. v. House, 1 Wyo. 27.) Defendant in error was impeached by four disinterested witnesses. A verdict unsustained by evidence is reversible. (Sec. 2652 Comp. Stats. 1910; Marshall v. Rugg. 6 Wyo. 286.) It is well settled that a verdict unsustained by the evidence will be set aside. (Denver & R. G. R. Co. v. Peterson, 30 Colo. 77, 69 Pac. 587; Westfield First Nat. Bank v. Smith, 99 Mass. 605; Alexander v. Harrison, 38 Mo. 258, 90 Am. Dec. 431; Barnes v. Mead, 30 N. C. 292, 49 Am. Dec. 390; Oregon R. & Nav. Co. v. Egley, 2 Wash. 409, 26 Pac. 973; Rahles v. J. Thompson & Sons Mfg. Co., 137 Wis. 506; Kester v. Wagner, 22 Wyo. 512; White v. Dougal, 159 Pac. 907.) It is apparent that the jury rendered quotient or chance verdicts on four of the counts, since vastly different amounts are alleged due therein where the jury found the same amount due on each of them, a result not sustained by the evidence, and they should be set aside. (2 Thompson on Trials, 2606; 22nd Enc. P. & P. 855; Williams v. State, 15 Lea 129.) There is a variance between pleading and proof in that plaintiff sets up two distinct contracts and offers proof on different contracts; a party cannot declare on one contract and then recover on another. (Sumrell v. Co., 62 S. E. 619; Allen v. Burns, 201 Mass. 74, 87 N. E. 194; Jackson v. Bruice, 63 S. E. 823.) The party introducing the contract in evidence is bound by it in its entirety. (Jonasson v. Weir, 115 N. Y. S. 6.) In an action upon an oral contract, all the essentials must be proven. (Benedict v. McMurtry, 115 N. Y. S. 87.) The recovery must be based on the contract alleged. (Green v. South States Lumber Co., 50 So. 917 (Ala.); Seavey v. Ansonia Mfg. Co., 111 N. Y. S. 661.) Recovery cannot be due on *quantum meruit* in an action brought on a contract without separate allegations. (Davis v. Drew, 111 S. W. 869; Schilling Bros. v. Grain Co., 116 N. W. 563; Ptacek v. Pisa, 231 Ill. 522.) One

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suing on an express contract cannot recover on *quantum meriut*. (Bennett v. Burkhalter, 57 S. E. 231 (Ga.); Basewood v. West, 101 S. W. 610 (Mo.); Kineon v. Rich, 100 S. W. 249 (Ky.).) The affidavit of Bryson relating to newly discovered evidence unknown to defendant until after the trial is material; if introduced at a new trial, it will undoubtedly produce a different result, and it is error to deny the application for a new trial on this ground. (Nolan v. McCue, 92 Kans. 870, 142 Pac. 958; Buford v. Benton, 144 Pac. 349.) The verdict is contrary to the instructions of the court and is therefore contrary to law and should be set aside. (Melzner v. Raven Copper Co., 47 Mont. 351, 132 Pac. 552; Wallace v. Weaver, 47 Mont. 437, 133 Pac. 1099; Multnomah County v. Towing Co., 89 Pac. 389 (Ore.); Chicago R. I. & Pac. Ry. Co. v. Groves, 93 Pac. 755.) The verdict and judgment not being sustained by law or evidence in the case, a new trial should be granted.

F. E. Anderson, for defendant in error.

An examination of the record will show that there is abundant evidence to sustain the verdict. There can be no objection to jurors acting freely upon the result of the average sense of the jury as to the amount of recovery and no impropriety in a jury resorting to this method for the purpose of arriving at an agreement. (Watson v. Reid, 46 Pac. Rep. 647-48.) The evidence does, in fact, show, as is alleged in the petition, a verbal agreement between the parties for the performance of services; certain notes made by Beaumier to the Case Manufacturing Company are referred to in the evidence; these notes were given by Beaumier in connection with the purchase of the traction engine and it was shown that Bryson's earnings were to be applied first upon these notes, secondly an allowance to Mrs. Beaumier of $50.00 per month, and thirdly advances to Beaumier for money for tobacco and other necessities; but this did not supersede the original agreement from the performance of services. No variance between the allegations and proof is material unless the adverse party has been misled thereby; when the variance is not material, the court may direct the

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facts to be found in accordance with the evidence and may order an amendment without costs. Failure of proof is not a variance. (Sections 4591-4593 Comp. Stats. 1910; Culin v. McKay, 7 Wyo. 42, 49 Pac. 473; C. B. & Q. R. v. Pollock, 16 Wyo. 321, 93 Pac. 847.) The allegations of plaintiff's petition were proven in their general scope and meaning. (Hoffman v. Murphy, 96 Pac. Rep. 780; Emerson v. Burnett, 52 Pac. Rep. 752; Peasley v. Hart, 4 Pac. Rep. 537; Ahern v. Telephone & Telegraph Co., 33 Pac. Rep. 403; Newell et al. v. National Advertising Co., 89 Pac. Rep. 792; Burgess v. Helm, 51 Pac. Rep. 1025.) As to the claim of newly discovered evidence, it was shown that the conversations and agreements occurring in the presence of Bryson were testified to by defendant below, plaintiff in error, first, and brought out upon his theory of the case. Defendant knew that Bryson was present and had knowledge of the transaction, but took no steps to communicate with him prior to the trial. The same facts were testified to by J. H. White and others, which went to the jury for their consideration. There is no valid ground for a new trial on the ground of newly discovered evidence. It is evident that the jury found that the contracts made in March, 1910, and May, 1911, were not obtained; that no partnership existed in the James Lake work and no loss was proven. There is really nothing to show that the instructions of the court were disregarded, and we think the verdict and judgment of the court below should not be disturbed.

BEARD, JUSTICE.

In this case, in the district court, Beaumier was plaintiff, and King was defendant. Plaintiff's second amended petition, upon which the cause was tried, contained eight counts or separate causes of action. In the first count he claimed $400 for threshing 10,000 bushels of oats for defendant in 1909, which with interest amounted to $502.20. In the second count he claimed $84.00 for threshing 2,100 bushels of oats in 1910, which with interest amounted to $106.10. In the third count he claimed $362.04 for threshing 9,051

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bushels of oats in 1911, amounting with interest to $417.00. In the fourth count he claimed $210 for 60 days' labor in January and February, 1908, at $3.50 per day, amounting with interest to $312.20. In the fifth count he alleged that about March 15, 1910, plaintiff and defendant entered into a verbal agreement by which defendant agreed to hire plaintiff to work for defendant at $3.50 per day, and to hire a traction engine belonging to plaintiff at $10.00 per day. That pursuant to said agreement he worked for defendant during the year 1910 a total of 235 days, for which he claimed $822.50, which with interest amounted to $1,039.15. In the sixth count he alleged that about May 5, 1911, plaintiff and defendant entered into a verbal agreement wherein defendant agreed to hire plaintiff and his said engine at the same price as in 1910; and that he so worked in 1911 a total of 158 days, for which he claimed $553.00, which with interest amounted to $661.15. In the seventh count he alleged that pursuant to the agreement of March, 1910, defendant used said traction engine 152 days in 1910, for which he claimed $1,520.00, which with interest amounted to $1,925.30. In the eighth count he claimed for the use of said engine for 72 days in 1911, $720.00, which with interest amounted to $861.12. The total amount claimed being $5,824.22, less an admitted credit of $1,765.89.

The answer contained first, a denial of the allegations of each count in the petition; and second, alleged as a counterclaim, "That said plaintiff and defendant entered into a copartnership arrangement to construct certain work which is commonly known and called the Lake James Irrigation System. That said plaintiff, through mismanagement and misappropriation of funds, damaged said defendant in the sum of $5,000.00." For which sum he prayed judgment against plaintiff.

Plaintiff by reply denied the allegations of the counterclaim.

The case was tried to a jury, which returned a verdict in favor of the plaintiff for the amount claimed in each of the first four counts of the petition, and in his favor for $295.58

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on each of the last four counts, and finding for plaintiff in the total sum of $2,519.72. It is contended by counsel for plaintiff in error that the verdict is contrary to the evidence, is not supported by sufficient evidence, and that the verdicts on the last four counts are quotient verdicts. The only evidence of the latter contention is the inference which might be drawn from the fact that the amount awarded by the jury on each of said counts is the same. Plaintiff testified that he worked the number of days in each of the years 1910 and 1911, for which he claims, and also to the days his engine was used, and that he kept the time from day to day in a book which was introduced in evidence. That the agreed price was $3.50 per day for his services, and $10.00 per day for the use of the engine. The theory upon which the case was tried on behalf of the defendant was that the parties were co-partners or joint contractors for doing certain work on the Lake James Irrigation System, and that there was a large loss on that contract, which King paid, and that the work performed by plaintiff for him, and the use of the engine, were to reimburse him for plaintiff's share of such loss, and that plaintiff was to receive $50.00 per month for the time he so worked. Considering the entire evidence in the case, we find it very unsatisfactory, uncertain and indefinite. There is no evidence in the record to sustain a finding that plaintiff worked the same number of days in each of the years 1910 and 1911, or that his engine was used the same number of days in each of those years, or that the price was different in the different years. The jury could not have based its finding upon the claim of either party upon the last four counts, as we read the evidence; and counsel have failed to enlighten us upon what theory, upon the evidence, it could do so. The plaintiff having stated his case in separate counts in his petition, each count purporting to state a separate and distinct cause of action, the verdict on each count must be sustained by the evidence in the same manner and to the same degree as though they were separate actions. It is not enough that the evidence might support some verdict and judgment, but it must be sufficient to support the par-

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ticular verdict and judgment rendered. (King v. C. C. Bendell Commission Co., 44 Pac. (Colo. App.) 377; Meyer v. Shamp, 51 Neb. 424.)

The verdicts on the 1st and 4th counts are contrary to the evidence. There is an admitted credit of $1,765.89, and there is no evidence that either party applied it to any particular item or items of the indebtedness. The several claims being of the same grade, and neither party having elected to apply the payment on any particular item or items of the indebtedness, the rule is that it shall be applied in payment and satisfaction of the item or items first becoming due. (30 Cyc. 1244, and authorities cited in notes.) Applying that rule to the present case, the admitted credit would have more than paid and satisfied the amount found due on said counts.

Another ground contained in the motion for a new trial is newly discovered evidence. One John H. Brison, in his affidavit in support of that ground of the motion, states, in substance, that in the spring of 1910 he had a conversation with plaintiff, in which conversation plaintiff stated that prior to said time he and King had been in partnership in work on the Lake James proposition and had suffered severe losses and that King had to and did stand said losses. That he (plaintiff) had entered into a contract with King to work for him with his engine on the King reservoir until it was completed for which he was to receive no compensation other than fifty dollars per month, with which he could support his family during said period. That he then informed me that he was working for King upon his reservoir under the terms of said agreement in order to repay King his portion of the losses sustained by said partnership. This evidence is competent, material and relevant to the issues on the theory upon which the case was tried. The affidavit of defendant in support of the motion for a new trial sufficiently shows it to be newly discovered evidence which he could not have discovered by the exercise of reasonable diligence before the trial and that it did not come to his knowledge until after the trial. This new evidence was not merely

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cumulative. Plaintiff testified that the contract under which he worked was $3.50 per day for his services and $10.00 per day for the use of his engine, and that there was no partnership in the Lake James contract. Brison's testimony consists of an admission or confession of a party to the action that the contract was not as testified to by him. It has been repeatedly held where there is a dispute as to what the contract was, the admission of a party to a third person that the contract was different from that testified to by him, or was as claimed and testified to by the other party, is evidence of a different character and is not merely cumulative. (Gardner v. Mitchell, 6 Pickering, 113; Klopp v. Jill, 4 Kan. 482; Alger v. Merritt, 16 Ia. 121; Murray v. Weber, 92 Ia. 757; Andrews v. Mitchell, 92 Ga. 629; Humphreys v. Klick, 49 Ind. 189; Rains v. Ballow, 54 Ind. 79; Preston v. Otley, 88 Va. 491; Feister v. Kent, 92 Ia. 1.) If Brison's evidence had been given upon the trial it is not improbable that the result would have been different. For the reasons stated, we are of the opinion that the plaintiff in error is entitled to a new trial and that the district court erred in refusing to grant it. The judgment is therefore reversed and the cause remanded for a new trial.

Reversed and remanded.

POTTER, C. J., and BLYDENBURGH, J., concur.

GOODRICH v. BIG HORN COUNTY BANK.

(No. 940; Decided August 17th, 1918; 174 Pac. 191.)

APPEAL AND ERROR—DIRECT APPEAL—RECORD—ENTRY OF JUDGMENT—AMENDMENT OF RECORD.

1. Since the statute providing for direct appeals requires the serving and filing of notice of appeal and the preparation and filing of record on appeal within ten days from the entry of the order or judgment appealed from, it is necessary to show jurisdiction that the fact of the entry of the judgment or order, as distinguished from the rendition thereof and the date of the entry, shall be shown by the record.

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2. A motion to withdraw the record on appeal for amendment showing the fact and date of entry of judgment will be denied, where, if so amended, the record would show that it was not filed within the statutory time after entry of judgment, so that the Supreme Court would remain without jurisdiction.

APPEAL from District Court, Big Horn County, HON. P. W. METZ, Judge.

Action by Goodrich and another against the Big Horn County Bank and another. From a judgment for defendants, plaintiffs appeal. Heard on motion to withdraw record for purpose of amendment.

E. E. Enterline, Thomas M. Hyde and H. W. Rich, for appellants.

C. A. Zaring, Herbert V. Lacey and John W. Lacey, for respondents.

The court is without jurisdiction. Plaintiffs have moved for leave to withdraw the record and make amendments. It would be useless to amend the record, for the reason that if so amended, it would show that it was not filed within the time required by the statute, and the court would remain without jurisdiction. The record was certified by the Clerk below and filed on February 26th, 1918; that was more than seventy days from December 10th, 1917, the alleged date of the entry of the judgment. It is not shown that the time for preparing and filing the record was enlarged or extended by the court or judge, as permitted by the statute, if cause shown. So that if the record should be amended to show the entry of the judgment on the date stated in the motion, it would appear from the record that the appeal was not perfected within the time specified and limited by the statute.

POTTER, CHIEF JUSTICE.

This case is here on appeal, and is before us on a motion of the appellants to withdraw the record for the purpose of presenting the same to the district court for amendment to show that the judgment was entered on December 10, 1917, and to explain the signing of the certificate of the dis-

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trict judge to the record on March 1, 1918, instead of February 26, 1918, the date that the record was filed.

The statute authorizing a review in this court of a judgment or order of a district court by direct appeal provides that such appeal must be taken by serving and filing a notice to that effect within ten days from the entry of the order or judgment appealed from, and that the appellant shall be entitled as a matter of right to seventy days after the entry of the judgment or order appealed from within which to prepare and file with the clerk of the district court a record for the appeal, which time may be extended or enlarged by the court or the judge thereof for cause shown. It also provides that the record on the appeal in civil causes shall be prepared by the clerk of the district court and that it shall consist of the original pleadings, motions, demurrers, instructions given and refused, orders, verdict, finding, decision or judgment, and the notice of appeal, or certified copies thereof, securely attached together in their chronological order, and a transcript of the testimony, if one is prepared and filed, as authorized by the act, and is brought up on the appeal, and that to the whole thereof shall be attached the specifications of error; that the whole record when so prepared, shall be paged and numbered consecutively, and shall be certified to as true and correct by the judge and clerk of the district court. (Laws of 1917, Ch. 32, Secs. 1, 2, 4 & 6.)

Since the statute thus provides for serving and filing the notice of appeal, and preparing and filing the record on the appeal, within a specified time respectively from the entry of the order or judgment appealed from, it is necessary, to show jurisdiction, that the fact of the entry of the judgment or order, as distinguished from the rendition or making thereof, and the date of the entry, shall be shown by the record. (Hahn v. Citizens' State Bank, 171 Pac. 889, 172 Pac. 705.) Having referred in the opinion in that case to the provisions of the act specifying the time for taking and perfecting the appeal by reference to the entry of the order or judgment appealed from, and the general provisions of

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the statute requiring all judgments and orders to be entered on the journal of the court, we said:

"These several provisions (of the act authorizing the appeal), considered together, seem to contemplate that there shall be a record entry of the order or judgment appealed from before any appeal shall be taken. Clearly no record on appeal can show the fact or date of the entry before an entry has been made, nor can a proper record be prepared showing the judgment or order complained of, unless and until the same has been entered, for that should be shown by a transcript of the journal entry. * * * And it will be presumed that an entry was made on the date under which it appears in the journal, unless the contrary is shown by the entry itself or by the record otherwise."

In the case cited the record did not contain a transcript of the journal entry of the judgment nor anything to show that it had been entered, and on the ground that the record did not show an entry of the judgment before the appeal was taken the appeal was dismissed. The record in this case is in the same condition in that respect. It contains the judgment signed by the judge and filed with the clerk as one of the papers in the cause, and it is dated as done in open court on December 8, 1917, and endorsed as filed on December 10, 1917. But it does not contain a transcript of a journal entry of the judgment or anything to show that the judgment has been entered.

It is now proposed in part by said motion to withdraw the record to have the defect aforesaid corrected by an amendment showing the fact and the date of the entry of the judgment and that it was entered on December 10, 1917. And the motion is supported by an affidavit of counsel stating that the judgment was entered on that date.

Such a motion might, we think, ordinarily be granted. That much was indicated by the original opinion in the case above cited, and in the opinion denying a rehearing we said in effect, that an application to return a record on appeal for amendment so as to show an entry of the judgment might be granted, if timely made, when accompanied by a

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showing that the judgment had been entered and at such time or under such conditions as to give effect and validity to the appeal. The motion under consideration is opposed on the ground that to amend the record as proposed would be a useless procedure, for the reason that if so amended the record would show that it was not filed within the time required by the statute, and the court would remain without jurisdiction. And upon that ground we think the motion should be denied.

The record was certified to as true and correct by the clerk of the district court and filed on February 26, 1918. That was more than seventy days from December 10, 1917, the alleged date of the entry of the judgment, and it is not disclosed by the record, nor is it suggested by the motion, that the time for preparing and filing the record was extended or enlarged by the court or judge, as permitted by the statute for cause shown. So that if the record should be amended to show the entry of the judgment on the date stated in the motion it would affirmatively appear from the record that the appeal was not perfected within the time specified and limited by the statute. Therefore, treating the record as filed on February 26, 1918, without considering the fact that the certificate of the district judge completing its authentication was not signed until March 1, 1918, or the effect thereof upon the previous filing, it is apparent that it was not filed in time to give this court jurisdiction, if the judgment was entered on December 10, 1917. And as nothing would be gained by the amendment now proposed or allowing the record to be withdrawn for that purpose the present motion will be denied.

Motion denied.

BEARD, J., and BIYDENBURGH, J., concur.

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[OCTOBER TERM, 1918.]

LINCH v. HARDEN.

(No. 919; Decided December 9th, 1918; 176 Pac. 156.)

CUSTODY OF CHILD—DIVORCE—FOREIGN DECREE.

1. In determining the question of its custody, the welfare of a child of divorced parents is a matter of paramount consideration. Judgments awarding custody of children of divorced parents, necessarily provisional in character, ordinarily are not *res judicata* either in the same court or that of another state, despite the full faith and credit clause of the Federal Constitution (Art. 4, Sec. 1), except as to the specific facts before the court at the time of any judgment in question.
2. Where an Oregon court which had divorced the father and granted him custody of his minor daughter on the ground that the mother was not a suitable custodian, a Wyoming court thereafter, upon a showing that the mother was in a situation and condition properly to care for the child properly, awarded custody to her; the Oregon decree being conclusive only as to facts on which it was made.

APPEAL from district court, Natrona County, CHARLES E. WINTER, Judge.

Habeas corpus proceedings by Cliff Leamore Linch v. Faith Hannah Harden. From a judgment for respondent, plaintiff appeals.

George W. Ferguson, for appellant.

Appellant rests his cause in this court on his right to the custody of the minor child by virtue of the judgment of the Circuit Court of the State of Oregon awarding the custody of the child to him; that judgment rendered by a court having jurisdiction of both parties and of the subject matter is entitled to full faith and credit throughout the United States under the provision of the Federal Constitution. (Art. 4, Sec. 1. Barber v. Barber, 16 L. Ed. 226; Cheever v. Wilson, 19 L. Ed. 604; Harding v. Harding, 49 L. Ed. 1066; Haddock v. Haddock, 50 L. Ed. 567.) The welfare and best interest of the child is the sole consideration. (Jones v. Bowman, 13 Wyo. 79; Tytler v. Tytler, 15 Wyo. 319.)

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The full faith and credit clause of the federal Constitution applies to decrees awarding the custody of children in divorce. (14 Cyc. 810; State ex rel. Giroux v. Giroux, 47 Pac. 798 (Mont.); State ex rel. Nipp v. District Court, 128 Pac. 590 (Mont.); Stetson v. Stetson, 15 Atl. 60 (Me.); Milner v. Gatlin, 76 S. E. 860 (Ga.); Wilson v. Elliott, 97 Am. St. Rep. 928 (Tex.); J. W. Lanning, Sr., v. Alice M. Gregory, et al., 10 L. R. A. N. S. 690; Morrill v. Morrill. 77 Atl. 1; Weatherton v. Taylor, 187 S. W. 450 (Ark.); State v. Rhodes, 69 Pac. 389 (Wash.); People v. Allen, 11 N. E. 143, 611 (N. Y.).). The rule seems to be sustained by the acknowledged weight of authority.

Hagens & Stanley, for respondent.

The best interests of the child are the controlling consideration; this proposition is conceded by counsel for appellant; but this ground is waived by appellant and reliance is placed upon the full faith and credit clause of the Constitution. (Art. IV, Sec. 1, citing Haddock v. Haddock, 50 L. Ed. 867.) That case does not sustain appellant's position, for the reason that a decree awarding alimony and custody of minor children in a divorce action is not final in the sense that it is not an absolute judgment. (Israel v. Israel, 148 Fed. 576; Re: Stewart, 77 Misc. 524, 137 N. Y. Supp. 202.) While authorities may be found supporting appellant's contention, they seem to be in the minority. The majority rule is that a change of circumstances will warrant a disregard of the decree of a sister state in actions of this class. (Mylius v. Cargill (N. M.), 142 Pac. 918; Re: Alderman, 39 L. R. A. (N. C.) 988; Jones v. Bowman, supra; Tytler v. Tytler, supra.) It is therefore submitted that the decree of the Oregon Court is not final and does not come within the provision of Art. IV, Sec. 1, federal Constitution; that each state has the right to determine the civil status of its own citizens and persons domiciled within its jurisdiction and is therefore not restricted by the limitations of the federal Constitution, as regards foreign divorce decrees.

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BEARD, JUSTICE.

This is a habeas corpus case involving the right to the custody of the daughter of the parties, a child born February 12, 1912. On the trial the custody of the child was awarded to the mother, and the father appeals.

The parties were married in South Dakota in 1909, living in that state and Nebraska until the fall of 1912, when appellant went to Oregon, where he was employed as a brakeman. His wife and the child joined him in Oregon in April or May, 1913. Their married life was not congenial and they separated in June, 1915, divided their household goods between them, and entered into a written agreement as to the custody of the child, in which it is recited that appellant was about to apply for a divorce from his wife; that the child should be taken back to Nebraska by its mother and placed in the custody and care of an aunt, appellant to clothe the child, and appellee to otherwise support it. If appellant secured a divorce, the child should be returned to Oregon at the expiration of one year. The suit for divorce was thereupon commenced, service being made upon appellee, and soon thereafter she took the child to Nebraska as agreed. Appellee defaulted in the divorce action and a decree of divorce was entered October 22, 1915, but no provision was made in the decree as to the custody of the child, nor does it appear by the record that that question was in issue in that action. Appellee married her present husband (Harden) in November or December, 1915, since which time she has resided with her husband in Casper, Wyoming. Appellant failed to clothe the child as agreed, and in March, 1916, it was taken to the home of its mother in Casper, where it has remained. Neither appellee nor the child returned to Oregon. Appellant applied to the court in Oregon in which the divorce was granted for a modification of the decree so as to award the custody of the child to him. Appellee appeared in that proceeding by her attorney, and on September 2, 1916, an order was made giving the father the care and custody of the child. He commenced the present case in the district court of Natrona

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county, Wyoming, December 27, 1916, and it was tried and determined in March, 1917. Appellant married his present wife in January, 1917.

Appellant presents but one question in this court as fully and conclusively appears from the following statements contained in his briefs. "While appellant pleads in his amended petition that it is for the best interests of their said minor child that he be given her care and custody, for the reason that it is for her best interests, and believes that the evidence sustains this plea, yet to simplify the hearing in this court, he waives this ground of his amended petition and rests his case in this court on his right to said minor child by virtue of the order and judgment of the Circuit Court of the State of Oregon, for the county of Clackamas, as modified on September 2, 1916." (Appellant's original brief, page 3.)

"That we may be clearly understood, we want to restate our position. In this court we are resting our case on the judgment of the Oregon court, which settled and adjudicated the question of the best interests of the minor child, under the facts then existing. This judgment is binding and must be upheld in all the states of this Union, until conditions have sufficiently changed to justify a different judgment, or until the same is modified on proper application in the court where rendered." (Appellant's reply brief, pages 6 and 7.)

The decided cases are not in entire harmony on the question whether or not a judgment in a divorce action awarding the custody of a minor child to one of the parties, being temporary in character, is such a judgment as is contemplated in Section 1, Article IV, of the Constitution of the United States, which provides: "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state," where the child at the time the judgment is rendered is domiciled in another state. But our attention has not been called to any case, nor have we found any, wherein it has been held that the courts of the state of the domicile of the child are bound by the judgment of the foreign state when it is made to appear that the conditions and circumstances of the parties have so changed

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since the adjudication that the welfare of the child would be promoted by a change of custody. The welfare of the child is a matter of paramount consideration, and has been so held by this court. (Jones et ux. v. Bowman, 13 Wyo. 79, 77 Pac. 439; 67 L. R. A. 860; Tytler v. Tytler, 15 Wyo. 319, 89 Pac. 1, 123 Am. St. Rep. 1067; Harris v. Muir, 24 Wyo. 213, 157 Pac. 26.) In 2 Bishop on Marriage and Divorce, 2nd Ed., 1189, the doctrine on the subject of the effect of the decree of a court in another state awarding the custody of a minor to one of the parents in a divorce action is stated as follows: "Under our national Constitution, this order is plainly a record to which, if the court has jurisdiction, the same faith and effect permitted it in the state of its rendition must be given in every other state. And the true rule in the state of its rendition is that it is *res judicata* concluding the question. But it does not conclude the question for all time, since new facts may create new issues. Nor, since the relation of parent and child is a status, rightfully, like marriage, regulated by any state in which the parties are domiciled, does the order in one state operate as an estoppel of all further inquiry in the courts of another state wherein the child has acquired a domicile." The correct rule on the subject, as we understand it, is well and concisely stated by the Supreme Court of New Mexico, in Mylius v. Cargill, 142 Pac. 918, 1915B, L. R. A. (N. S.) 154, where, after quoting as above from Bishop, and citing further authorities, said: "The soundness of this doctrine is apparent. The relation of parent and child is a status and may be changed with changing circumstances. The welfare of the child is always the paramount consideration for the court in awarding the custody of children to one parent or the other in cases of divorce and separation. The welfare of the child may be best subserved at one time by awarding its custody to one parent, and at another time just the opposite course should be taken. These judgments are necessarily provisional and temporary in character, and are ordinarily not *res judicata,* either in the same court or that of a foreign jurisdiction, except as to facts before the court at

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the time of the judgment." (See also note to Seeley v. Seeley, 12 Ann. Cas. 1059; Re. Alderman, 157 N. C. 507, 73 S. E. 126, 39 L. R. A. (N. S.) 988, and note; 9 R. C. L. Sec. 293.)

In the present case it would serve no useful purpose and only unduly lengthen the opinion to set out the evidence, consisting of oral testimony and affidavits. It appears that at the time the matter of the custody of the child was heard by the Oregon court, there was evidence to the effect that the mother was not at that time a fit person to have the care of the child for reasons not necessary to here state. Whatever objections there may have been to her having the custody of her child, and however well founded such objections may have been, the evidence before the court at the hearing of the present case is, in our opinion, sufficient to sustain the conclusion that those objections no longer exist, and that the mother is now in a situation and condition to properly care for her child. She has a comfortable home with proper surroundings; and her present husband is shown to be able and willing to properly support her and the child. That the welfare of a female child of tender years is best subserved by being in the care and custody of its mother, if she is competent and a fit person to discharge those duties, is generally conceded. The finding of the trial court is a general finding, awarding the custody of the child to the mother until the further order of the court, and granting to the father the privilege of visiting it at all reasonable times. No doubt the court gave full faith and credit to the judgment of the Oregon court as to the facts shown at that time, but found such a change in the condition and the situation of the parties as warranted leaving the child in the care and custody of the mother; and in that conclusion we concur.

The judgment of the district court is affirmed.

Affirmed.

POTTER, C. J. concurs.

BLYDENBURGH, J., being ill, did not participate in the decision.

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GARRETSON v. AVERY.

(No. 915; Decided December 16th, 1918; 176 Pac. 433.)

ANIMALS—DUTY OF LAND OWNER TO MAINTAIN FENCE—COMMON LAW RULE—DEFECTS IN PREMISES—INJURY TO LIVESTOCK RUNNING AT LARGE—NEGLIGENCE — STATUTES — CONSTRUCTION — UNLAWFUL ENCLOSURE—FENCES.

1. The common law rule requiring the owner of domestic animals to restrain them has never been enforced in this state because of different conditions existing that render the rule inapplicable, the owner of such animals having a right to permit them to run at large, and no actionable trespass is committed by such animals lawfully running at large, or straying upon uninclosed lands.
2. The rule of the common law that it is not the duty of a land owner to fence against the livestock of another, is also the rule in this state, in the absence of a contract or statute imposing that duty, or unless such duty has arisen by prescription.
3. Where no obligation rests upon a land owner to fence out another's livestock, or to prevent them from straying or entering upon his land, the owner of uninclosed land is under no duty to make or keep them in safe condition for stock straying thereon.
4. Comp. St., 1910, Section 2578, defining lawful fence, including therein barbed wire, post and pole, and board fences, and Section 2588, making all persons maintaining any unlawful wire fence liable in a civil action for damages to animals, "by reason of such unlawful enclosure", held not to make landowner maintaining barbed wire fence other than described in statute liable for death of a cow which strayed into an alfalfa field, when the alfalfa was a dangerous feed, the words "unlawful enclosure" meaning merely "fence".
5. The penal provisions of Comp. St., 1910, Sections 2587, 2588, are clearly intended not to require land to be enclosed, but to prevent the building or maintaining of a wire fence in any other manner than that declared to be lawful, which might cause injury to animals and perhaps persons by coming in contact therewith. They do not impose the duty of fencing out another's livestock and have no reference thereto.
6. Comp. Stats., 1910, Section 2589, as copied from Revised Statutes, 1899, Section 1984, erroneously omits the words "on or before the first day of August, 1888", which were

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included in the original enactment, so that there was no general provision in the original section for the reconstruction of unlawful wire fences constructed after that date.

ERROR to the District Court, Big Horn County, HON P. W. METZ, Judge.

Action by G. J. Garretson against H. C. Avery. Judgment for defendant, and plaintiff appeals.

R. B. Landfair, for appellant.

If one constructs a wire fence, it must be a lawful fence, as defined by Section 2578, Comp. Stats. 1910; and after so constructed, it must be maintained as a lawful fence, else the owner is liable for all damages to stock by reason thereof under Section 2588 Comp. Stats. 1910. Stock owners have implied license to depasture their stock on a public range and are not guilty of any contributory negligence in so doing. The negligence of respondent in not maintaining a lawful fence was the approximate cause of the death of the animal. (Sections 2578, 2588 Comp. Stats. 1910.) If a land owner has a lawful fence and a breachy animal breaks through and does damage, the owner of the animal is liable. (Section 2584, Comp. Stats. 1910.) Appellant had a right to assume that respondent maintained a lawful fence and an injury to appellant's stock by reason of respondent's unlawful enclosure creates a liability. (Loveland v. Gardiner, 79 Calif. 317, 21 Pac. 766.) An enclosure is any ground enclosed by a lawful fence. (Smith v. Williams, 2 Mont. 195.) Stockgrowers have an implied license to depasture the public range. (Martin v. Sheep Company, 12 Wyo. 432; Live Stock Co. v. McIlquam, 14 Wyo. 209; Section 2614, Comp. Stats. 1910.) Where animals were lawfully running at large, recovery may be had unless the owner was guilty of actual negligence. (Isbell v. R. R., 27 Conn. 393, 71 Am. Dec. 78; Haughey v. Hart, 62 Iowa 96, 17 N. W. 189; Kerwhacker v. R. R., 3 O. St. 172, 62 Am. Rep. 246; Wilhite v. Speakman, 79 Ala. 400; 19 Cyc. 487; 29 Cyc. 444.)

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R. B. West, for respondent.

The case arises under Section 2588, Comp. Stats. 1910. Defendant admits that in Wyoming livestock may lawfully run at large, but contend that if one maintains an unlawful fence, he will be liable in damage for injury occasioned by stock coming in contact with it; an enclosure is an artificial fence surrounding one's estate. (Bouvier Law Dictionary.) The only case we have found sustaining the damages for injuries to animals coming in contact with an unlawful fence is that of Sisk v. Crump, 2 Am. St. Rep. 213. The general rule is that no liability exists. (29 Cyc. 444.) The owner of land not enclosed by a lawful fence was held not liable for an ox killed by eating green corn upon the land. (Herald v. Myers, 28 Ia. 378.) A land owner is not permitted to construct traps or maintain dangerous places upon his land, but this rule has no bearing upon the case at bar. The recovery in the words of the statute is limited to injuries sustained by reason of unlawful wire fences. (Section 2588, Comp. Stats. 1910.) Apparently the legislative intention in limiting the liability to wire fences was that such fences improperly constructed or poorly maintained constituted a trap and might injure stock. Under plaintiff's theory, a land owner growing a crop of alfalfa unfenced would be liable to the owner of stock straying upon the same and dying from the effects of eating the alfalfa, but if the owner should commence the construction of a fence enclosing his land and before the completion thereof, cattle should stray upon his land and die from the effect of eating alfalfa, the land owner would be liable in damage. The result of such a construction would be so utterly absurd that no court would give it consideration. It is respectfully submitted that no liability is shown and that the judgment of the District Court should be sustained.

POTTER, CHIEF JUSTICE.

This cause was heard in the district court upon a general demurrer to an amended petition, and the demurrer was sustained. The plaintiff excepted thereto and elected to

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stand upon the petition without pleading further, and thereupon a judgment was rendered in favor of the defendant. The case is here on appeal.

The petition alleges in substance: That on or about July 20, 1916, the defendant was occupying, using, enjoying, maintaining and in charge of a certain enclosure in Big Horn county, this state, to-wit: The NE¼ of the NE¼ of Sec. 27, Twp. 50 N., Range 93 W., within which said enclosure the defendant was cultivating and raising alfalfa grass. That he did not keep or maintain a lawful fence around said enclosure, but that the fence was unlawful in this: That in some places there were only two wires of the wire fence around the enclosure, between posts about 30 feet apart and without any stays between the posts; that the wires were loose and sagging; and the fence was in such condition that it would allow cattle to stray and enter the enclosure. That green alfalfa grass is a well known danger to cattle used to dry feed only. That on or about said date the plaintiff was the owner of a cow of the value of one hundred dollars, which he had allowed on that date and previous thereto to run upon the public range and was used to dry feed only. That the eating of green alfalfa grass by cattle used to dry feed only causes them to bloat and is invariably fatal to them, a fact generally known to all cattle raisers, ranchers, and well known by the defendant. That on or about said date, by reason of the careless, negligent and unlawful maintaining by the defendant of his said fence, the said cow of the plaintiff strayed in and upon the said enclosure and ate green alfalfa grass and thereby became bloated and died, to plaintiff's damage in the sum of $100. And judgment was prayed for that sum with interest and costs.

It will be observed from these allegations that the right of action or claim for damages is based solely upon the alleged fact that defendant maintained an unlawful wire fence around said land, referred to as his enclosure, which would allow cattle to stray and enter thereon. No other act of negligence or violation of duty is alleged, nor that the de-

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fendant was bound by contract or otherwise to build or maintain a fence enclosing the land or the crop growing thereon. And it is not here contended that there would be any liability on any other ground than that alleged in the petition. But the appellant's contentions are stated in his brief substantially as follows: 1. If a wire fence is constructed, it must be a lawful fence. 2. That, having been constructed, it must be maintained as a lawful fence, or the owner will be liable for all damages to stock caused by the failure to so maintain it. 3. That there is an implied license to depasture livestock on the public range, and the owner is not guilty of contributory negligence in doing so. 4. That respondent's negligence in failing to maintain a lawful fence was the proximate cause of the death of the animal.

Appellant concedes in his brief that no obligation to fence is imposed by law, and, further, quoting from the brief: "It is true the law is well settled that where there is no obligation to fence and trespassing stock go upon unenclosed lands no recovery can be had for damage to crops or damage to stock, each using ordinary care." But it is argued, in substance, that, although a landowner is under no obligation to fence out another's livestock, and may leave his land and growing crops unenclosed and himself thereby free from liability for injury to stock straying thereon, it becomes his duty, under the statute, when constructing a wire fence around or to enclose his land, to so construct it that it will be a lawful fence as defined by the statute; and that after it has been constructed the further duty is imposed upon him to maintain it as a lawful fence; and that the rule of no liability where there is no obligation to fence, and cattle or other domestic animals trespassing upon unenclosed lands are injured or die from eating some poisonous substance thereon or from falling into a pit, well or other excavation, is therefore not applicable.

The common law rule requiring the owner of cattle and other domestic animals to restrain them has never been in force in this state, because of different conditions existing rendering that rule inapplicable, the owner of such animals

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having a right to permit them to run at large; and no actionable trespass is committed by such animals lawfully running at large straying upon unenclosed lands. (Hecht v. Harrison, 5 Wyo. 279, 40 Pac. 306; State v. Johnson, 7 Wyo. 512, 54 Pac. 502; Cosgriff v. Miller, 10 Wyo. 190, 68 Pac. 206, 98 Am. St. Rep. 977; Martin v. Platte Valley Sheep Co., 12 Wyo. 432, 76 Pac. 571, 78 Pac. 1093; Healy v. Smith, 14 Wyo. 263, 83 Pac. 583, 116 Am. St. Rep. 1004; Hardman v. King, 14 Wyo. 503, 85 Pac. 382; Gillespie v. Wheatland Industrial Co., 22 Wyo. 331, 140 Pac. 832, 52 L. R. A. (N. S.) 133, Ann. Cas. 1917A, 287, 52 L. R. A. (N. S.) 133.) The "reason for such non-liability", as explained in Gillespie v. Wheatland Industrial Co., "is not because they are not trespassing, but because no duty rests upon the owner to keep his stock off uninclosed land and he is not guilty of negligence in failing to do so or in permitting them to run at large; and being guilty of neither a wilful trespass, nor negligence in the care of his stock, he is not answerable in damages; and for the further reason that the land owner has the right to exclude such stock from his premises by fencing against them, or otherwise preventing them from coming or being thereon, and if he neglects to do so he takes the risk of trespass by animals lawfully running at large." But the rule of the common law that it is not the duty of a land owner to fence out or against the cattle or live stock of another is also the rule in this and other western states where the same conditions exist, in the absence of contract or statute imposing that duty upon the land owner, or unless such duty has arisen by prescription. And, as a general rule, where no obligation rests upon a land owner to fence out another's live stock, or to prevent them from straying or entering upon his land, "the owner of uninclosed lands is under no duty to make or keep them in safe condition for stock straying thereon." (Gillespie v. Wheatland Industrial Co., supra.) In that case it was sought to recover damages for the death of cattle caused by their falling into an open ditch upon unenclosed land. It was held that the owner could not recover. And the principle, for the same

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reasons, has been applied in the absence of a duty to fence against live stock, where animals have entered upon land through an insufficient or a defective fence and died from eating or drinking injurious matter left or growing thereon. (Herold v. Meyers, 20 Ia. 378; Chemical Co. v. Henry, 114 Tenn. 152, 85 S. W. 401; Morrison v. Cornelius, 63 N. C. 346; Fennell v. Street Ry Co., 70 Tex. 670, 8 S. W. 486. And see Ponting v. Noakes, 2 Q. B. Div. L. R. (1894) 281.) Several cases in support of the general rule that it is not the duty of the owner of unenclosed lands to make or keep them in safe condition for straying stock are cited in Gillespie v. Wheatland Industrial Co., supra, and many others are cited in the elaborate notes to that case as reported in Ann. Cas. 1917A, pp. 288 to 296, and 52 L. R. A. (N. S.), pp. 133 to 140.

As above stated, the right of action in this case is based upon the alleged negligence of the defendant in failing to maintain a lawful fence, or in maintaining a fence surrounding his land in such a defective condition that it permitted plaintiff's cow to enter upon the land through said fence. And in support thereof the plaintiff relies upon the provisions of Sections 2578 and 2588, Compiled Statutes of 1910. Section 2578 defines what shall constitute a lawful fence in this state, and as in force in 1916, when this cause of action is alleged to have accrued, reads as follows (omitting some immaterial provisions at the end of the section):

"The following shall be a lawful fence in the State of Wyoming: A fence made of tubular wrought iron fence posts or sound wooden posts and three spans of barbed wire, or two spans of barbed wire with a wooden rail on top, and said posts so used to be tubular wrought iron fence posts, with cast iron base to be twenty-two inches in length, or wooden posts at least four inches in diameter, set firmly in the ground at least twenty inches deep, either side of said posts, so used, to be placed at no greater distance apart than eighty feet, with iron or wooden stays not more than ten feet apart; a post and board fence made of sound posts, not

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less than four inches in diameter, set substantially in the ground not more than ten feet apart, with three boards of one inch lumber, eight inches wide, and not more than ten inches apart, or four boards of one inch thick and six inches wide, not more than eight inches apart, securely fastened with nails or otherwise, a three pole fence with round poles, not less than two inches in diameter, at the small end, with either upright or leaning posts, not more than twenty-two feet apart, and securely fastened with nails, wires, or otherwise; Provided, That all other fences made and constructed of boards, rails, poles, stones, or hedge plants, or other material except wire, which, upon evidence, shall be declared to be as strong and as well calculated to protect enclosures, and shall be as effective for resisting breaching stock as those hereinbefore described, shall be considered a lawful fence; Provided, That none of the fences above described shall be considered lawful if less than four feet high, except within the corporate limits of an incorporated city or town."

As will be observed, that section describes not only a lawful barbed wire fence, but also a lawful post and board fence, and a lawful pole fence, and provides further that all other fences constructed of any material except wire, shall be considered lawful, which, upon evidence, shall be declared as strong and as well calculated to protect enclosures, and as effective for resisting breaching stock, as those described.

Section 2588 reads as follows:

"Any person or persons, company or corporation who shall construct or maintain, contrary to the provisions of this chapter, any unlawful wire fence, shall be liable in a civil action for all damages to animals that may occur by reason of such unlawful enclosure, and the owner or owners of any such unlawful wire fence shall, moveover, be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in a sum not less than five dollars nor more than twenty-five dollars, and for each subsequent offense the fine shall not be less than twenty-five dollars nor more than one hundred dollars."

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Appellant's contention is based particularly upon the provision of Section 2588, declaring a liability on the part of one who constructs or maintains an unlawful wire fence for all damages to animals occurring by reason of the unlawful enclosure. And the question to be here determined under that provision is whether it refers to or includes an injury or damage such as that alleged in this case, occurring within the enclosure; that is to say, a damage not caused by contact with the fence or the wires thereof. And we think it does not. On the contrary, we think it has reference to the material of which the fence is constructed as a source of danger to animals coming in contact with it, and to damages which may be caused by a fence insufficiently or defectively constructed of wire, as distinguished from one constructed of other material not possessing the same element of danger or as likely to cause injury.

The fence statute nowhere declares a liability for damages occurring by reason of any other kind of unlawful fence or enclosure or provides any penalty for constructing or maintaining any other kind of fence not constructed or maintained so as to constitute a lawful fence as defined by law. And it is clear that there must have been some reason for the above mentioned provisions with respect to an unlawful wire fence that would not apply to any other kind of fence. We cannot conceive that the legislature would have singled out a wire fence and prescribed a penalty for constructing or maintaining it in an unlawful manner and given a right of action for damages, as in Section 2588, if it did not have in mind a danger peculiar to that kind of a fence and a damage that might occur to an animal therefrom, which would not exist or be liable to occur in the case of an unlawful post and board fence, pole fence, or any other kind of fence which the statute declares or authorizes to be declared lawful, except one made of wire.

It is certain that if the fence maintained around the land in question had been constructed of some material other than wire, and had been so defective that it would not prevent the entry of animals upon the land, the same injury and

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damage might have occurred as that here alleged. And it would seem at least possible that a defect or opening in any other kind of fence might make access to the enclosure more easy and frequent, because of the less difficulty or danger for an animal to pass over or through a fence not made of wire. What possible reason could there have been for limiting the provisions of Section 2588 to an unlawful wire fence if the object was to protect against dangers that might exist within an enclosure because of the condition of the premises or the use made thereof, or injuries that might occur therein as a result of such condition or use? We can conceive of none. Such dangers would not be less nor such injuries less liable to occur from or by reason of any other kind of fence constructed or maintained in a manner insufficient to constitute a lawful fence. The same opportunity for live stock to enter the enclosure may be afforded by such a fence, an equal probability that they will do so may exist, and such live stock will be exposed to the same dangers present within the enclosure, aside from contact with the fence, whatever the material of which the fence is constructed or maintained, if insufficient to prevent an animal from going through or over it upon the enclosed premises. And to construe the provision in question as we have above indicated it should be construed is not inconsistent with the language thereof. Counsel for appellant argues that in declaring a liability for all damages occurring by reason of "such unlawful enclosure" injuries within the enclosure are included, though not caused by the fence otherwise than through its failure to prevent the animal from entering upon the land. But in the sense in which the words "such unlawful enclosure" are there used they mean nothing more than if the word "fence" had been used instead of "enclosure". Construing the word "enclosure" not as standing alone, but in connection with the other words employed in the provision itself and the other connected provisions of the section, it cannot be held to refer to an enclosure as distinguished from the fence. A similar use of the words "enclosure" and "fence" in the same sentence is found in Section 2584, containing provisions

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with reference to an action for damages for animals breaching into a lawful enclosure, viz: It is therein provided that if it shall appear "that the plaintiff's enclosure is a lawful fence" he shall be allowed to prove his damages, but if it shall appear "that the plaintiff's enclosure is not a lawful fence" judgment shall be rendered against him. Clearly, the provision aforesaid in Section 2588 refers to an enclosure which is unlawful only because the wire fence is constructed or maintained in an unlawful manner.

The history of the legislation, in view of the condition of the law at the time these provisions were enacted, tends to support our construction of the section. It has been held in many cases that, in the absence of a statute either authorizing or prohibiting the construction of a barbed wire fence, one who negligently constructs or maintains such a fence, that is to say, in a negligent manner, resulting in an injury to live stock by contact with the wires of the fence, is liable in damages for such injury; but it is also held that a fence of that material is not a nuisance, nor its construction negligence, *per se*. (Sisk v. Crump, 112 Ind. 502, 14 N. E. 301, 2 Am. St. Rep. 213; Mullen v. Renzleman, 31 Okla. 53, 119 Pac. 641, Ann. Cas. 1913D, 778. And see note to the Oklahoma case in the volume of Ann. Cas. cited, p. 781.) But when the provisions of our statute here relied on and above quoted were enacted the law on the subject independent of statute was unsettled. The statute containing these provisions was enacted in 1888. (Laws 1888, Ch. 33.) A previous similar statute had been enacted in 1882. (Laws 1882, Ch. 46, Rev. Stat. 1887, Secs. 4192, 4194.) Prior to the Act of 1882 the fence statute did not include a wire or barbed wire fence among those declared to be lawful. (Comp. Laws 1876, Ch. 51.) By these statutory provisions the questions aforesaid relating to the right to construct and maintain a barbed wire fence and the liability for injuries caused thereby were settled, first, by declaring a barbed wire fence to be lawful when constructed in the manner described, and, second, to protect against the natural dangers to live stock of such a fence when improperly constructed or main-

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tained, by declaring a liability to damages for injuries occurring therefrom when not constructed or maintained in a lawful manner. We think that must have been the reason for the legislative provisions aforesaid, in view of the unsettled condition of the law on the subject at the time. And the object and intent is carried out by the construction limiting the provision for liability for damages to injury or damage caused by contact with the fence or the wire or wires used in its construction. For such a fence could not cause an injury in any other way that could not equally be caused by a fence improperly constructed of different material, or that could reasonably justify a statutory liability or penalty imposed only upon one constructing or maintaining an unlawful wire fence, as distinguished from a fence constructed of boards, poles, or material other than wire.

We think it true that one constructing or maintaining a wire fence is required by the statute to construct or maintain it as a lawful fence. That seems to follow from the provision of Section 2588 that the owner or owners of an unlawful wire fence shall be deemed guilty of a misdemeanor, and prescribing a fine as punishment upon conviction thereof. And there are other provisions to the same effect in Sections 2587 and 2589, Compiled Statutes, which require the owner of an unlawful wire fence to reconstruct it into a lawful wire fence, and provide a penalty for his refusal or failure to do so. Parenthetically, it may be said that Section 2589, as found in the Compiled Statutes of 1910, which was copied therein from the Revised Statutes of 1899, is not what was enacted by the legislature. The mistake was first made in the Revised Statutes of 1899 by omitting some important words included in the section as originally enacted. The section as enacted was Section 3 of the Act of 1888 (Ch. 33). That section in the original act immediately followed a section containing the provisions now found in Section 2588; and said section 3 provided, not as stated in the Revised Statutes of 1899 and Compiled Statutes of 1910, that "the owner or owners of any unlawful wire fence shall reconstruct the same into a lawful wire

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fence", but it provided: "The owner or owners of any unlawful wire fence shall, on or before the first day of August, A. D. 1888, reconstruct the same into a lawful wire fence." The section does not appear to have been amended in any way by the legislature, and the reason is not apparent for omitting the words prescribing the date on or before which the fence shall be reconstructed. As originally enacted, therefore, and as we think the section must still be understood as providing, it required the owner to reconstruct the fence on or before August first, 1888, and could only have referred to unlawful fences then in existence or that might be constructed prior to August 1, 1888. The section did not include a general provision for the reconstruction of unlawful wire fences constructed after that date. Section 2587, however, provides in substance that the owner or owners of any unlawful wire fence, who shall have been convicted of constructing or maintaining the same shall, within thirty days after such conviction, reconstruct it into a lawful wire fence, and it prescribes a penalty for refusal or failure so to do. And such owner might be convicted under the penal provision of Section 2588, thereby making Section 2587 operative.

But it does not follow that the owner is liable for damages for an injury occurring within the enclosure from other causes than contact with the fence. The statutory requirement that a wire fence shall be constructed and maintained as a lawful wire fence, if constructed or maintained at all as a wire fence, does not impose the duty to fence or to prevent the entry of another's cattle upon the owner's land. There would seem to be no doubt that, notwithstanding the said provisions of the statute, one having constructed and maintained an unlawful wire fence, as well as a lawful one, may remove the same and allow his land to remain unenclosed, unless he is bound by contract to prevent another's live stock from straying upon his land, or that duty has arisen by prescription. And it is not otherwise contended in this case. The penal provisions aforesaid and the provisions requiring an unlawful wire fence to be reconstructed into a lawful wire fence, are clearly intended, not to require

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land to be enclosed, but to prevent the building or maintaining of a wire fence in any other manner than that declared to be lawful, which might cause injury to animals, and perhaps persons, by coming in contact therewith. They do not impose the duty of fencing out another's cattle or live stock and have no reference thereto. The same or similar provisions are not made as to any other kind of fence, and very clearly the legislature did not have in mind the fact that a fence constructed in an unlawful manner might be insufficient to enclose the premises so as to prevent animals from entering thereon. If the purpose was to prevent the construction or maintaining of fences insufficient to keep live stock outside the enclosure, these provisions would not have been limited to wire fences. We have no doubt that the statutory requirement that a wire fence when constructed or maintained shall be constructed or maintained as a lawful fence does not require the owner to keep his land enclosed so as to prevent live stock from entering thereon. It may be true that if a wire fence be lawfully constructed and maintained completely surrounding a tract of land it will keep out live stock. But that is clearly not what the legislature intended to accomplish. The evident purpose was to prevent injuries caused by the wires of an improperly constructed fence made of that material, and not to prevent the straying or trespassing of animals upon land either unenclosed or enclosed by an insufficient fence.

We hold, therefore, that the defendant was under no duty to keep his premises sufficiently enclosed to prevent the live stock of others from going upon his land, and that as the crop growing thereon was not unlawful, but might have been lawfully cultivated and grown upon unenclosed land, the fact that his fence had been carelessly constructed or in a manner other than that declared lawful by statute, and not so as to prevent the cow of plaintiff from going upon the land and eating of the crop thereon, is not liable for the damages claimed, and for that reason the petition fails to state a cause of action. We conclude that the demurrer was properly sustained.

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We have some doubt about the regularity of the appeal in this case. In some respects the proceedings do not strictly comply with the statute providing for bringing a cause to this court by appeal. But the question has not been raised by counsel, and as we are convinced that the judgment must be affirmed for the reasons above stated, the questions of practice that might arise upon the record have not been considered. An order will be entered affirming the judgment.

Affirmed.

BEARD, J., concurs.

BLYDENBURGH, J., being ill, did not participate in the decision.

BECKSTEAD v. FIRST NATIONAL BANK.

(No. 905; Decided December 30th, 1918; 176 Pac. 726.)

APPEAL AND ERROR—MATTERS REVIEWABLE—MOTION FOR NEW TRIAL—ESTOPPEL—PAYMENT—MORTGAGES—RIGHTS OF THIRD PERSONS.

1. A party plaintiff against whom judgment was rendered cannot complain of error below, where he filed no motion for new trial, although another plaintiff filed such a motion and brought error.
2. Where sheep of mortgagor of land were transferred to first mortgagee by bill of sale, stating they were taken at a price in excess of indebtedness, with intent to prevent other creditors from attaching the surplus, first mortgagee could not thereafter claim, as against a second mortgagee, that the price stated was not the true consideration, and that the full amount thereof was not applied on the first mortgagee's indebtedness, although the sheep sold on the market for less than the first mortgagee's claim.

ERROR to the District Court, Sweetwater County, HON. WILLIAM C. MENTZER, Judge.

Action by Frank Beckstead, et al. v. First National Bank of Evanston, Wyoming, et al. Judgment for defendants, and plaintiffs bring error.

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T. S. Taliaferro, Jr., and *W. A. Muir* for plaintiff in error, Morris State Bank.

The findings and judgment failed to distinguish the position of the plaintiff bank from that of the Becksteads; the judgment should have provided that before the temporary injunction was dissolved, or the foreclosure permitted, defendant bank should liquidate the indebtedness due the plaintiff bank. The trial court erred in finding that no expenses on account of foreclosure were chargeable against the plaintiff Beckstead. It was made clear by the evidence that representatives of defendant bank connived to prevent the Green River Mercantile Company from realizing on its claim as a junior incumbrancer. The most usual application of the doctrine of estoppel *in pais* arises from the misrepresentation or concealment of material facts on the part of the person to be estopped. (Am. & Eng. Enc., Vol. 11, p. 421.) The defendant bank having made the representation that the purchase price of the sheep was $23,500.00 will be precluded from contesting its truth. An essential element of estoppel by misrepresentation or concealment is that one party should have relied upon the conduct of the other and induced by it to act or to refrain from acting so that he will be substantially injured if the other party should be allowed to repudiate his action. (Am. & Eng. Enc., Vol. 11, p. 436.)

P. W. Spaulding, for defendant in error, First National Bank of Evanston.

The State Bank of Green River was formerly the Morris State Bank. The change in name was suggested and agreed to by the parties during the trial. The plaintiff bank having relied upon the principle of estoppel waives all other questions, if such there be. (Pearce v. Holn (Wyo.), 152 Pac. 786.) Only one of the plaintiffs moved for a new trial, but all three of the original plaintiffs bring error. The brief filed is on behalf of but one of the plaintiffs in error, to-wit, the plaintiff bank. A consideration recited in a bill of sale is always opened to exception. (Davis Photo Co. v. Jewelry Co., 19 Am. Cas. 541.) There is no evidence of a substantial injury to the plaintiff bank, or the Green River Mercan-

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tile Company upon which to base the principle of estoppel. The action is brought as an equitable action, but defendant bank has failed to show equities existing in its favor. He who comes into equity must do equity, so that if the Becksteads and the plaintiff bank can ask a court to cancel the mortgages held by defendant bank, they must show payment in full or offer payment in full. (Corpus Juris, Vol. 1, p. 539.) It being equitable that the whole debt can be paid, it cannot be inequitable to extinguish first those debts for which the security is most precarious. (Jones Chat. Mortgage, 5th Ed., Sec. 639; Field v. Holland, 10 U. S. 28, 3 L. Ed. 136.) The sheep having been sold, the proceeds should be applied first to the mortgages on the sheep and then to the notes secured by the mortgages on the lands.

T. S. Taliaferro, Jr., and *W. A. Muir,* for plaintiffs in error, in reply.

The trial court erred in not applying the doctrine of estoppel to the evidence of defendant in error in seeking to substitute another consideration for the bill of sale than the $23,500.00 stated therein. (Union Bank v. Securities Company, 157 N. W. 510; Ensel v. Levy, et al., 19 N. E. 597; Marling v. Fitzgerald, 138 Wis. 93, 121 N. W. 388, 131 A. S. R. 1003.) The trial court erred in fixing a different consideration for the bill of sale than that expressed therein. The trial court erred in refusing to allow the sum of $118.50 for the care and keep of the six head of horses. The trial court erred in charging the account of Beckstead for services in accompanying the sheep to market.

BEARD, JUSTICE.

This action was brought by the plaintiffs in error against the defendants in error to enjoin the foreclosure by notice and sale of two mortgages upon real estate, given by the plaintiffs, Beckstead, to the defendant bank, alleging that the debts secured thereby had been paid. Upon the trial the district court found and adjudged that there was due said bank from the plaintiffs, Frank Beckstead and Z. Mack Beckstead, upon said indebtedness, $3,045.15, with interest

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from October 2, 1915, $44.88 for advertising notice of foreclosure, and $200.00 attorneys' fees in the foreclosure proceedings; decreed said mortgages to be a prior and superior lien upon the real estate to a mortgage given thereon by said Frank and Z. Mack Beckstead to The Green River Mercantile Company and assigned to the plaintiff bank, dissolved the temporary injunction theretofore issued in the action, found generally in favor of defendants and rendered judgment against plaintiffs for costs. From those findings, judgment and decree, plaintiffs bring error.

There is not much controversy as to the material facts in the case. It is admitted that on July 7, 1915, the Becksteads were indebted to the defendant bank in the sum of $17,500.00, which was secured by a chattel mortgage on sheep, horses, wagons and camp outfit used in running the sheep, and were also indebted to said bank on said date in the further sum of $5,000.00, secured by real estate mortgages. That their total indebtedness to said bank on October 1, 1915, was $22,915.00. On that day Frank Beckstead and Z. Mack Beckstead, being indebted to The Green River Mercantile Company in the sum of $2,105.35, and in consideration of a further credit of $500.00, gave their promissory note, secured by mortgage on the real estate in question, for the sum of $2,605.35, which was afterwards assigned to the plaintiff bank and remains unpaid. September 11, 1915, the defendant bank, in writing, appointed John H. Ward its agent to take possession of the property described in the chattel mortgage and to sell the same as provided by law. Either that day or within a day or two thereafter Ward and the cashier of the defendant bank went to the Beckstead ranch when it was agreed that the Becksteads should have ten days in which to raise $21,500.00, which the cashier agreed to accept in full payment of the bank's claim if paid within that time. Ward did not take possession of the mortgaged property. Nothing further was done until October 1, 1915, when the cashier met the Becksteads in Green River, Wyoming, at which time what was done can best be stated by quoting his testimony given on the trial, as follows:

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"I met Mr. Beckstead about 10 o'clock in the morning. We went into the hotel in my room. I asked him, I think, if he succeeded in raising the money,—said he hadn't. I asked him what he was going to do with the sheep going to be sold, if he had any way of getting rid of them to the best advantage. He said he wanted to sell them in Omaha. I asked him if he was aware that several attachments were threatened. He said he was. I explained to him Mr. Taliaferro had threatened to attach the sheep. Ivan Jones from Kemmerer had been down there to represent a debt at Kemmerer of something over a thousand dollars, and Blyth & Fargo Company was getting anxious here, he owed them something like $1,400. And he said that he realized if the foreclosure proceeded that these attachments would be served, that they would clean up everything that he had. And we talked it over on lines of the best thing to do; wanted to know if there was any way of protecting him; I told him only way we could do to take title of the sheep, if we proceeded to foreclose they had a right to make attachments. We decided one way to get title was to take a bill of sale. I suggested to Mr. Beckstead if we took a bill of sale that I would expect him to protect the Blyth & Fargo Company at Evanston, make a substantial payment on their debt. This he hesitated to do for a while, and I asked him again if he would agree to that, finally said he would agree to that, I said: all right, I will take your word. So we proceeded to draw up the bill of sale. The bill of sale was drawn for the consideration of $22,500 and that was for the sheep. Mr. Beckstead insisted that we should also put the bucks and horses in there because he wanted those also protected. I says: Wouldn't make any difference to put them in, so we put them in. Mr. Beckstead signed the bill of sale there at the room. Went out on the street and we picked up Mr. Ward, went out to the sheep camp in order for Mack Beckstead to sign the bill of sale. It was fully agreed with Mr. Beckstead and myself that the bank would only want the face of the notes and the interest and any overplus would go to him. * * * He went over to him (Mack

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Beckstead), they returned in a few minutes. Mr. Mack Beckstead seemed to be very much pleased with the arrangement that had been made and he signed the bill of sale. * * * I think I gave Mr. Beckstead a dollar and Mr. Mack Beckstead a nickle, which was all I had left; proceeded over the brow of the hill, the sheep were browsing along on the side of the hill; told Mr. Frank Beckstead the sheep looked well, ought to bring a good price on the market. I says: It seems a shame to ship them out of the country. He says: I realize that—I want them to go, listen to nothing else that the whole business is shipped out of the country. So I told him that would be probably what we would have to do with them. Got to taling values. He says: Great deal more sheep than the bill of sale calls for. I says: I think there are, certainly do. I says: That will make it bad for us getting the sheep shipped to Omaha and have the money attached down there and tied up a thousand miles away, make a great deal of trouble for the bank, and it was suggested——" (Objection by plaintiff.) By the court: "State what was said and done there, as nearly as you can, Mr. Bradbury." "I am not sure whether I suggested to raise the price of the sheep, but I am inclined to think I did, wanted to be careful to see that there was no overplus under the bill of sale, that there would be any attachments down there. He said that was what he wanted to do. We agreed to raise the bill of sale a thousand dollars. We returned to town, and that evening Mack Beckstead came in and a new bill of sale was made for $23,500, and Mr. Ward said something about he didn't know whether it was legal or not. I told him I thought it was all right, so far as value was concerned didn't care anything about that, so long as we had enough to avoid the attachments. Mack signed the bill of sale; the bill of sale that we had made previous to this was torn up and thrown into the waste basket." On cross-examination, witness stated:

"The value in the bill of sale wasn't considered at all. Frank understood it at that time, and he understands it now; never agreed to pay him the value of the bill of sale; at no

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time had we agreed to pay him the value that the bill of sale called for; that the bill of sale was given for the sole reason that the bank should gain the title of the sheep, and if there was any overplus that he would get it, and if he would do the right thing that he would take care of Blyth & Fargo indebtedness, which had been standing, I think, longer than any of the other accounts."

A letter written by Mr. Taliaferro, attorney for plaintiffs, to Frank Beckstead, dated November 12, 1915, was introduced in evidence, in which the indebtedness of the Becksteads to the defendant bank was stated to be $22,500, with interest from July 7, 1915; "that the purchase price of the sheep and camp outfit, horses and bucks and equipment was $23,500." Mr. Bradbury, the cashier of defendant bank, testified, "He (Taliaferro) called his stenographer and told her to write the letter you see here; didn't pay any attention, and when he finished he said: I want you to read this letter. I told him I didn't care to read the letter. He says: You think it is about what the case is? I says: Somewhere near. He says: Want you to read it. I told him I didn't care to. I walked out of the room before the letter was out of the machine. Q. What did you tell him regarding those figures in the bill of sale? A. Don't know that I told him anything, we had accepted the bill of sale. Q. With the figures in it? A. Yes, didn't necessarily mean we would pay it, though."

At the time this action was commenced, April 11, 1916, the defendant bank was proceeding to foreclose the two real estate mortgages by advertisement and sale, the defendant McCourt acting as its agent to conduct the sale.

At the time of the execution of the bill of sale the amount of the Becksteads' indebtedness to the defendant bank secured by the chattel mortgage was $17,500, with eight per cent. per annum interest from July 7, 1915. From the testimony of the cashier of the defendant bank, above set out, it is too clear to admit of argument that the purpose in taking the bill of sale was to prevent other known creditors of the Becksteads from attaching the property. He further

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distinctly stated in his testimony that "it was fully agreed with Mr. Beckstead and myself, that the bank would only want the face of the notes and the interest and any overplus would go to him." And again, "The bill of sale was given for the sole reason that the bank should gain the title of the sheep, and if there was any overplus that he would get it."

Most of the sheep were shipped to Omaha, Nebraska, and sold by defendant bank and some of the other property included in the bill of sale was sold at private sale. The amount realized from the sales was insufficient to pay the Becksteads' indebtedness to said bank; and the court so found as herein above stated.

The Becksteads are not in a position to complain of that finding for the reason, if for no other, that they filed no motion for a new trial. The plaintiff bank, however, stands in a different situation. In the circumstances shown by the evidence of the defendant bank, the plaintiff bank had a right to believe that the considerations stated in the bill of sale, $23,500, less the liens of the herders, the taxes and other legitimate expenses incurred up to that time, would be credited on the indebtedness. The defendant bank having represented that it had taken over the property for that amount with the intent and for the purpose, as stated by its cashier, of preventing other known creditors of the Becksteads from attaching the property, and agreeing that any surplus arising from the transaction should go to the Becksteads, cannot be heard in a court of equity to claim between it and those creditors that that was not the true consideration. As between the banks, the defendant bank is entitled to a superior lien on the real estate for the difference between $23,500, the consideration stated in the bill of sale, and the following accounts:

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Due the bank Oct. 1, 1915	$22,915.00
Herders' liens	1,120.71
Taxes	151.62
Attorneys' fees	200.00
Advertising	44.88
Total	$24,432.21
Less	23,500.00
	$ 932.21

with interest on said sum of $932.21 from October 1, 1915. Subject to that lien the plaintiff bank is entitled to a lien on said real estate for the amount due upon its claim secured by mortgage thereon, superior to the balance due the defendant bank or its mortgage. The cause will be remanded to the district court with directions to modify its judgment and decree as above indicated. Plaintiff in error bank to recover its costs in this court.

Modified and remanded with directions.

POTTER, C. J., concurs.

BLYDENBURGH, J., being ill, did not participate.

STATE v. BOARD OF COMMISSIONERS.

(No. 938; Decided January 3rd, 1919; 177 Pac. 130.)

INTOXICATING LIQUORS—ISSUING LICENSE—DISCRETION—INCORPORATED TOWNS.

1. Comp. Stats., 1910, Section 1578, Subdiv. 9, having granted to town councils of incorporated towns power to license, regulate, or forbid the sale of intoxicants, any discretion of county commissioners under Comp. Stats., 1910, Section 2833, as to issuing a liquor license, does not include a right or power on the part of the commissioners to refuse the issuance of a license solely because of opposition to the operation of liquor saloons.

ERROR to District Court of Platte County, HON. WILLIAM C. MENTZER, Judge.

Mandamus proceedings upon the relation of Fred W. Rehder against the Board of County Commissioners of

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Platte County and others. Writ refused and relator brings error.

Kinkead & Henderson, for plaintiff in error.

An inferior tribunal may be required to exercise its judgment or discharge its functions, but its judicial discretion cannot be controlled by mandamus. (Section 5055, Comp. Stats. 1910.) County Commissioners have power to issue licenses. (Section 2833, Comp Stats. 1910; Laws 1901, Ch. 43; Laws 1909, Ch. 7.) Town councils have power to regulate license or forbid sales of intoxicating liquors. (Section 1578, Subdiv. 9, Comp Stats. 1910. Statutory construction, 36 Cyc. 1146. Curry v. Lehman, 47 So. 18.) Counties distinguished from cities. (11 Cyc. 342.) Limitation of commissioners' power. (11 Cyc. 588; 2 Wyo. 346; 37 Pac. 483.) Board cannot act capriciously. (State v. New Orleans, 67 L. R. A. 70; Re. Christianson, 43 Fed-243; Noble v. Cheyenne, 2 Wyo. 417.) Arbitrary refusal to act will be enforced by mandamus. (15 R. C. L; Smith v. Butters, 32 L. R. A. 343; in re. Phillips, 116 N. W. 950.) The word "shall" precludes discretion. (Potter v. Homer, 59 Mich. 8; Braconier v. Packard, 136 Mass. 50.) The words "may" or "it shall be lawful" imply discretion. (Ex parte Whitington, 34 Ark. 394.) Where the word "may" is used in conferring power and the public, or a third person, has an interest in the exercise thereof, the exercise becomes imperative. (McLeod v. Scott, 21 Ore. 94; Smith v. King, 14 Ore. 10, 12 Pac. 8; People v. Commonwealth, 130 Ia. 482, 6 L. R. A. 161.) There can be no discretion where the ordinance stipulates that the mayor shall grant licenses to applicants furnishing evidence of good character and offering required bonds in fee. (People v. Creiger, 138 Ill. 401; People v. Homer, supra; State v. New Orleans, 67 L. R. A. (La.) 70; People v. Commissioners, supra.)

C. A. Paige, for defendants in error.

Under Section 2833 the Board of County Commissioners are vested with discretionary powers to grant or refuse to grant liquor license. Board of County Commissioners have

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discretionary power in granting or refusing to grant license. (Smith v. County Com'rs, 112 Pac. 809, 32 L. R. A. (N. S.); Anderson v. County Com'rs, 125 Pac. 188, 25 Pac. 739; Sullivan v. County Com'rs, 125 Pac. 191; Anderson v. County Com'rs, 125 Pac. 193; State v. Halt County Court, 39 Mo. 521, 104 Mo. 685; Muller v. Commissioners, 89 N. C. 172; Crowley v. Christensen, 137 U. S. 86; In re. Hoover (D. C.), 30 Fed. 51; Atty. General v. Justices, 27 N. C. 315; Gus Jugenheimer v. State, 81 Neb. 836, 831; Dunbar v. Frazer, 78 Ala. 538; State of Minn., 60 Minn. 510; Harrison v. People, 222 Ill. 150.) The case of Smith v. County Com'rs, 122 Pac. 809, cites nearly all of the above cases and seems to be a case where about the same facts are presented as in the case at bar. (58 Hun (N. Y.) 495; 96 Mich. 193, 21 L. R. A. 580.)

BEARD, JUSTICE.

There is but one question in this case, and that is, whether or not the board of county commissioners can be required by mandamus to issue a license to the relator for the carrying on and conducting of the business of a retail liquor dealer in the incorporated town of Guernsey, in Platte county, the admitted facts being that relator duly and regularly made application to said board for such license; that he was a man of good moral character, a resident and freeholder of said county, and was able, ready and willing to pay for said license. That the town council of said town by a resolution duly made, presented to and filed with said board, approved and recommended the granting of such license to relator. That certain remonstrances were made orally to and in the presence of said board against the granting of any license which would authorize the trafficking in intoxicating liquors in said town; that said remonstrances were not directed against any individual applying for license, or against the good character or other qualifications of the applicant, but on the ground that the remonstrants claimed that it was neither wise nor for the best interests of the community that saloons be operated in said town.

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The board refused to issue a license to relator; but it is not claimed that it did so because it found or decided that he was not a man of good moral character, was a non-resident or not a freeholder. It was stipulated that one member of the board voted against the license because of said remonstrances and for no other reason. That another member of the board voted against granting the license for no other reason than that he was and is opposed to the existence of saloons in Platte county, without regard to the character of the conductors thereof. The other member of the board voted in favor of granting the license.

The district court refused to issue a writ of mandamus requiring the board to issue a license to relator and gave judgment against him for costs. He brings error.

Counsel for relator contend that as it is admitted that relator was a man of good moral character, a resident and freeholder of the county, the board of county commissioners had no discretion in the matter and that it was the duty of the board to grant the license, and that their action in refusing the license was capricious and arbitrary as disclosed by the admitted facts. On the other hand, the county attorney insists that the board is given a wide discretion in the matter and that its action cannot be conrolled by mandamus.

The provisions of our statutes in so far as they are here involved and which we are called upon to construe are as follows: "No person or persons within this state, directly or indirectly, in person or by agent or employee, shall vend, sell, barter or dispose of for any pecuniary advantage, any spirituous, malt, fermented or intoxicating liquors or wine without first obtaining a license therefor as provided in this chapter." (Sec. 2832, Comp. Stats. 1910.)

"Before any license shall be granted for the sale of liquors, the applicant therefor shall file his written application for such license in the office of the county clerk. Said application shall contain a full and accurate description of the building in which liquors are to be sold, and a full and accurate description of the premises on which such building is located. All applications for county license shall be heard at

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the second regular meeting of the board of county commissioners which shall occur subsequent to the filing of the application; Provided, however, That in counties in which the boards of county commissioners are not required by law to meet monthly, notice of such application with a full and accurate description of the buildings and premises where liquors are intended to be sold, shall be given by publishing the same for four weeks successively in some newspaper published and of general circulation in the county, or if no newspaper is published therein, by posting for four weeks as aforesaid written or printed notices in five of the most public places in the vicinity of the said premises, and such application in such county shall be heard at the next regular meeting of the board of county commissioners after the completion of said time. All county licenses shall be granted by the boards of county commissioners of the several counties and they shall have power to grant licenses only to persons of good moral character who are freeholders in this state; Provided, That said board shall refuse to grant any license or extend any existing license for the sale of liquors at any place outside of incorporated cities and towns." (Sec. 2833, Comp. Stat. 1910.)

"All licenses issued by any county in this state for the sale of liquors, * * * when the licensee shall be a resident of and carrying on the business for which he is licensed within the corporate limits of any incorporated town, city or village, the license shall be collected by the city marshal or collecting officers of such incorporated town, city or village, for the purposes mentioned in this chapter. It shall be the duty of such collecting officer, between the first and fifteenth days of each month, to pay into the treasury of such incorporated town, city or village, all money collected for such licenses, which moneys shall be applied to the general revenue purposes of such incorporated town, city or village." (Sec. 2826, Comp. Stats. 1910.) In the law governing incorporated towns they are given the power "to license and regulate or forbid the sale of spirituous and intoxicating liquors within such town, or within one mile of

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the outer boundaries thereof." (Subdivision Nine, Sec. 1578, Comp. Stats. 1910.) The legislature having conferred upon incorporated towns express authority to license or forbid the sale of liquor therein, it would appear that the maxim *"expressio unius est exclusio alterius"* is applicable here. In Broom's Legal Maxims it is said: "that no maxim of the law is of more general and uniform application; and it is never more applicable than in the construction and interpretation of statutes. Whenever a statute limits a thing to be done in a particular form, it necessarily includes in itself a negative, viz: that the thing shall not be done otherwise." (19 Cyc., 23.) Considering those several provisions of the statutes, we do not think the legislature intended to give the county commissioners unlimited discretion in the matter. But any doubt we might entertain from a consideration of the language of the several statutory provisions has been removed by an investigation of the history of the legislation on the subject, and particularly of said Section 2833. Prior to 1884 it was made the duty of the sheriff of each county to furnish all licenses, and collect the money for the same. (Sec. 1, Ch. 76, Comp. Laws 1876.) All moneys collected for licenses constituted a portion of the general county fund. (Sec. 5, id.) The licenses were prepared by the county clerk and delivered to the sheriff of the county in which issued. (Sec. 2, id.) In 1884 it was enacted that thereafter all licenses issued by Laramie county for the sale of liquor, and certain other licenses, for carrying on such business within the limits of any incorporated town, city or village within said county, should be collected by the marshal or collecting officer thereof and be paid into its treasury and become part of its general revenue. (Ch. 55, S. L. 1884.) In 1888 that provision was made to apply to all counties of the Territory. (Ch. 44, S. L. 1888.) The law so remained until 1901, and it is conceded that neither the sheriff or other collecting officer, nor the county clerk had any discretion in the matter and were required to furnish a license to anyone applying and paying therefor. In 1901 a bill was introduced in the Senate (Senate File No. 25) to

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amend and re-enact Section 2163, Revised Statutes of 1899 (which as amended and re-enacted is now Section 2833, Comp. Stats. 1910), which bill after providing for the filing of written application for such license in the office of the county clerk, notice, time of hearing, etc., as now contained in Section 2833, Comp. Stats. 1910 (with an immaterial change as to notice), contained the following provision, viz:

"Any person or persons shall have the right to file with the County Clerk written objections to the granting of any application. The application, whether objected to or otherwise, shall be heard upon evidence introduced at the next regular session of the County Commissioners after the completion of the notice aforesaid, and any person interested shall have compulsory process for witnesses. The Board of County Commissioners, upon hearing the evidence, shall have the discretion to refuse a license to sell liquors in any particular place or locality where it shall seem to them to be contrary to public policy or imprudent or hazardous that the business of selling or disposing of liquors shall be carried on; and upon hearing the evidence shall have the discretion to refuse a license to any person whom they may deem unfit to entrust with the said business. If, upon the evidence. the said Board of County Commissioners shall deem the place and person fit, they may grant the license prayed for."

Having been passed by the Senate, it was amended in the House by striking out the above quoted provision and inserting in lieu thereof the following: "All county licenses shall be granted by the board of county commissioners of the several counties and they shall have power to grant licenses only to persons of good moral character who are freeholders in this state; Provided, however, That said board shall have power to refuse any license for the selling of liquors at any place outside of incorporated cities and towns." The Senate refused to concur in the amendment made by the House and the bill was sent to a conference committee consisting of three members from each body, which committee reported recommending that there be inserted in the amend-

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ment made by the House the change in the notice above refrred to, and when so amended by the House, "that the Senate do thereupon concur in all amendments made by the House, including the additional amendment herein set forth." The House amended the bill as recommended, and it was duly passed, and approved by the Governor February 15, 1901. The only change made in that section since that time was in the proviso which was changed by Chapter 7, S. L. 1909, taking away the power to license saloons outside of incorporated cities and towns, and was made to read as contained in said section 2833, Comp. Stat. 1910.

It would seem that the legislature could not have more clearly expressed its intention not to give to the commissioners any discretion to refuse a license to an applicant whom they found qualified as required, other than that contained in the proviso. The striking out of the bill as introduced, all of its provisions vesting the board with discretion, except in one particular, certainly can not be construed as a grant of further discretion. The language, "Provided, however, that said boards shall have power to refuse any license for the selling of liquors at any place outside of incorporated cities and towns", clearly implies that the legislature believed and understood that without such grant the board would be without authority to so refuse. If the legislature understood that the board was already vested with such discretion, then the proviso was of no force and meaningless. "A proviso is a clause added to a statute, or to a section or part thereof, which introduces a condition or limitation upon the operation of the enactment, or makes special provision for cases excepted from the general provisions of the law, or qualifies or restrains its generality, or excludes some possible ground of misinterpretation of its extent." (Black on Interpretation of Laws, 270.) Here the proviso was evidently intended to give to the board a discretion to grant or refuse to grant licenses outside of incorporated cities and towns, but not otherwise. We are of the opinion that the fact that certain persons remonstrated against the granting of a license to the relator for the reasons stated, or that the mem-

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bers of the board or any one of them was opposed to granting any liquor licenses in the county did not legally justify the board in refusing to issue the license; and that according to the admitted facts in this case the board had no discretion in the matter. Counsel have cited many cases more or less bearing upon the question, but we find but little assistance from them on account of the difference in the language of the statutes in the several states, in many of which the board is expressly given full or limited discretion. We shall refer to a few only, cited by the county attorney. Smyth v. Butters et al., 38 Utah 151, 112 Pac. 809, 32 L. R. A. N. S. 393, is cited as in point. But we find the Utah statute contains this language: "Any application for such license may be refused for good cause, in the discretion of the board of trustees of the town, the city council of the city, or the board of county commissioners." Swift v. The People, 63 Ill. App. 453, was a case in which the ordinances provided, "The mayor of the city of Chicago shall from time to time grant licenses for the keeping of dram shops within the city of Chicago, to any person who shall apply to him in writing, upon said person furnishing sufficient evidence to satisfy him that he or she is a person of good moral character," etc. A license was refused by the mayor on the ground that the place where the business was proposed to be conducted was within a purely residence neighborhood, and that a saloon in such district would be a nuisance. The court stated that the establishment of a saloon at the place for which license was applied would be a nuisance, and held that "a court should not, by mandamus, compel the public officials to issue a license for the keeping of a saloon in a residence neighborhood, where a saloon will be a nuisance." A very different state of facts from those presented in the present case. Cases from North Carolina are cited. The latest case from that state to which our attention has been directed is Barnes v. Commissioners, 135 N. C. 27. The court in that case referred to earlier decisions, under a statute substantially like the one it was then considering, in which it had been held that the licensing officers possessed a limited legal discretion

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and followed the decision in those cases. And in further support of its holding referred to the fact that in 1893 after those cases were decided the law was changed to read, "Upon the filing of such application and affidavit, the commissioners shall, without the exercise of discretion, grant an order to the sheriff to issue such license." In 1897, before the Barnes case was decided, the law was changed by striking out the words "without the exercise of discretion", and the words "may grant" substituted for the words "shall grant", indicating an intention on the part of the legislature to vest at least some discretion in the commissioners. The court saying: "But this does not mean that they may use this discretion for the purpose of advancing or vindicating their own views or opinions upon the general policy of selling liquor." Without comment on the numerous other cases cited by counsel for the respective parties, we refer to the notes to Sherlock v. Stuart, 96 Mich. 193, 55 N. W. 845, 21 L. R. A. 580. In the case at bar the town authorities of the town of Guernsey have approved and recommended the issuance of a license to relator. And it is to the town council alone that the legislature has given direct authority to prohibit the sale of liquor in the town. Whether the board of county commissioners have any discretion in the matter, or implied authority to refuse a license to a duly qualified person for any cause, we need not determine. But we are convinced that the board had no right to refuse to do so for the reasons assigned and admitted to be the only reasons for so doing.

For the reasons stated, we are of the opinion that, upon the admitted facts in this case, the district court erred in refusing the writ of mandamus as prayed for, and that the judgment should be reversed, and the cause remanded for further proceedings not inconsistent herewith.

Reversed and remanded.

POTTER, C. J., and TIDBALL, District Judge, concur.

BLYDENBURGH, J., being ill and unable to sit, HON. V. J. TIDBALL, Judge of the Second Judicial District, was called in and sat in his stead.

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ALLEN v. LEWIS.

(No. 925; Decided January 11th, 1919; 177 Pac. 433.)

APPEAL AND ERROR—NEW TRIAL—AMENDMENT—RECORD ON APPEAL—ADDITIONS TO RECORD—REVIEW—REPEAL—STATUTES—CONSTRUCTION—INTENT—HEARING—TIME—TIME FOR TAKING APPEAL—JUDGMENT—PRIOR ADJUDICATION—MATTERS DETERMINED—REVERSAL—GROUNDS OF APPEAL—INSUFFICIENCY OF EVIDENCE—WATERS AND WATER COURSES—LICENSE—ADVERSE USE—ADVERSE POSSESSION—POSSESSION UNDER MISTAKE—TRIAL—FINDINGS OF FACT AND CONCLUSIONS OF LAW—INCONSISTENCY OF FINDINGS AND CONCLUSIONS.

1. Under Laws 1917, Ch. 32, Section 10, authorizing court to award new trial to an appellant on the appeal record and specification of errors filed, within 15 days after notice from clerk, order granting new trial, entered after the 15 days, was properly amended to show that new trial was considered within time, but hearing by consent of parties was had after the 15 days.
2. That an appeal from an order granting a new trial under Laws 1917, Ch. 32, authorizing court to award new trial to appellant on appeal record and specification of errors, has been filed in the Supreme Court, does not deprive the trial court of the right to amend the order by the addition of facts *nunc pro tunc*.
3. Where an order amends an order granting a new trial, it may be brought into the record on appeal on a party's application.
4. Where an amendment of an order for new trial appealed from is incorporated into the record on appeal on a party's application, the record need not be returned for correction, since, under Supreme Court rule 12 (104 Pac. xii), omissions may be incorporated by requiring the clerk to certify thereto, or by granting leave to file a duly certified copy.
5. Laws 1917, Ch. 32, providing for a review by direct appeal from an order granting or refusing a new trial, does not repeal the provisions for review of a cause on error.
6. An affirmative statutory provision relating to the time or manner of performing official acts, unqualified by negative words, is directory rather than mandatory, though it is a question of intention to be ascertained from a consideration of the entire act, its nature, object, and consequences of construction.
7. The provision of laws 1917, c. 32, authorizing court to award new trial to an appellant on the appeal record and specification of errors filed, that review of record must be

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had in 20 days, may be waived by consent, and the record retained in the trial court until the expiration of the extended time.

8. Where, under Laws 1917, c. 32, Sec. 10, authorizing court to award new trial to an appellant on appeal record and specification of errors, within 20 days after filing of specifications, the court granted a new trial, but by consent of parties order was not made until after the 20 days, such action did not preclude appeal by other party, it being provided that an appeal might be taken from the order granting the new trial.

9. A prior adjudication for plaintiff against defendant's assertion of title to the land, in a suit by plaintiff against defendant to recover the possession of crops grown by defendant on such land, did not bar defendant, in a subsequent suit by plaintiff for trespass in maintaining a flume and ditch across plaintiff's land, from asserting title to the right of way, since he might possess a right of way without owning the land.

10. To justify a reversal, in the absence of a record showing of the reasons on which the trial court acted in granting a new trial to plaintiff, there must be nothing in the specifications of error which would entitle plaintiff to a new trial.

11. In trespass for maintaining a flume over plaintiff's land for which defendant claimed to have a right of way by consent of a prior owner, new trial to plaintiff on ground that evidence did not show that such consent was given with full knowledge of the location of the true line held not error.

12. Where one locates a ditch and flume on another's land with consent and permission, and relies on the license therefor, he cannot claim a right of way by adverse possession.

13. Adverse possession cannot be based entirely on possession under a mistaken belief that a division fence built by claimant was on the true line.

14. In an action for trespass by the maintenance of a flume over plaintiff's land, claimed by defendant to be maintained by consent of former owner, findings of fact that such owner consented, and that defendant's use of the ditch and flume was adverse to such former owner, and conclusions of law that defendant's entry was under license, and that defendant had obtained title by adverse possession, were inconsistent.

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APPEAL from District Court, Washakie County; HON. P. W. METZ, Judge. Action by A. T. Allen against W. O. Lewis.

From an order granting plaintiff a new trial, defendant appeals.

Charles H. Harkins and *Lonabaugh & Wenzell,* for appellant.

On September 14th, twenty-eight days after the date of the filing of plaintiff's specifications of error, the judge assumed to pass upon the record and grant a new trial; the inquiry involves the question of the jurisdiction of the trial court to make such an order more than twenty days after the filing of the specifications in error; secondly, the propriety of granting a new trial; our statute on direct appeals apparently differs from similar statutes in other states in that it authorizes the trial court to grant a new trial before the case goes to the Supreme Court, and we assume no decision will be found in interpreting this provision of our statute; appellate procedure is statutory and may not be enlarged by construction. (2 Enc. P. & P. 16.) Nor jurisdiction conferred by consent. (Dailey v. Anderson, 7 Wyo. 1; Reardon v. Norton, 16 Wyo. 363; Burris v. R. R., 14 Wyo. 498; Cantlin v. Miller, 13 Wyo. 109; Boner v. Fall River, 168 Pac. 726.) The statute has fixed a period of fifteen days after the filing of specifications of error within which the trial court may review the record. If the judge may take longer than the time specified, the language of the act is set aside, and its whole purpose frustrated. The specifications of error are so general, that it is difficult to determine the ground upon which new trial was granted unless it be upon the principle of *res judicata.* Plaintiff seeks to enjoin defendant from building a ditch and flume across his land. Defendant claims a right of way, and plaintiff by reply pleads in bar the judgment in a formal trial. The question of an executed parol license and adverse enjoyment is claimed by plaintiff, and the following authorities are relied upon: Quinlan v. Noble, 75 Calif. 250, 17 Pac. 69; Long

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Ir. 2nd Ed. Sec. 62; Tallman v. Casey, 15 Ore. 83, 13 Pac. 669; Coventon v. Seuvert, 23 Ore. 548, 32 Pac. 508. A parol license cannot be revoked after licensee has expended money or labor in making improvements. (Bowman v. Bowman, 57 Pac. 546, 15 R. C. L. 491; Gustin v. Harding, 20 Wyo. 1; Shaw v. Prophet, 109 Pac. 584; Flickenger v. Shaw, 25 Pac. 268; Ewing v. Rhea, 62 Pac. 790; Stoner v. Zuckner, 83 Pac. 808; McBroom v. Thompason, 37 Pac. 57; Maple Grove Co. v. Marshall (Utah), 75 Pac. 369; Long on Irr. 2nd Ed., Sec. 225.) The doctrine of *res judicata* has no application in this case under the facts. The true requirement is that the two suits shall be the same, between the same parties, and that points in issue in former suit cannot be retired. (23 Cyc. 1156; Cromwell v. Sac Co., 94 U. S. 351, 24 L. Ed. 1950. Black Judgments 504; Freeman Judgments 249.) Another test is whether the same evidence will sustain both the present and former action. (Freeman Judgments 259. Stone v. U. S., 64 Fed. 667.) The former action was for damages in cutting and carrying away alfalfa. There was no question of land or right of way involved. The result was not decisive of the present case. (Black Judgments 619-617; 23 Cyc. 1172, 1313, 1304; Freeman Judgments 271-272.) The record cannot be contradicted. (Freeman Judgments 275-625.) No estoppel can be shown as to matters not within the pleadings. (Black Judgments 618.) Parol evidence may be introduced to show what was involved in the former case. (Black Judgments 625; Lillis v. Ditch Co., 27 Pac. 780.) But it must be shown that the judgment involved the determination of some facts. (Freeman Judgments 274.)

H. W. Rich, for respondent.

There was a stipulation by the parties that the cause might be reargued on September 12, 1917, and that the court might thereafter, upon consideration, enter its order overruling or sustaining the specifications of error. Reargument was had and on September 14th the court sustained specifications of error and granted a new trial. The question is whether the trial court may modify its order, so as to make the record

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speak the truth. Counsel for appellant apparently seeks to evade the effect of their stipulation. The trial court may amend its record. (Borrego v. Territory, 46 Pac. 349.) And may make *nunc pro tunc* entries to supply omissions. (Wright v. Nicholson, 134 U. S. 137; Kelley v. U. S., 27 Fed. 616; Fay v. Stubenrauch, 75 Pac. 174.) A mistake may be corrected. (People v. Murback, 30 Pac. 608.) It is error to refuse to amend a record in such cases. (Pleyte v. Pleyte, 24 Pac. 579 (Colo.).) The doctrine of *res judicata* applies. The ownership of the land, adverse possession, and the location of the boundary line between the lands was placed in issue by the pleadings in the former case and necessarily passed upon in the determination thereof. (Graham v. Culver, 3 Wyo. 639; Black Judgments 505.) The case of Warwick v. Underwood, 75 Am. Dec. 767, is directly in point; also Johnson v. San Francisco Union, 7 A. S. R. 129, 75 Calif. 134; Furneaux v. Bank (Kan.), 7 A. S. R. 541.) It was competent to show by parol evidence what was involved in the former suit between these parties. (Herschbach v. Cohen, 99 A. S. R. 233, 169 N. E. 932, 21 A. & E. Enc. 244; Hawk & Co. v. Evans, 14 A. S. R. 248, 76 Iowa 593.) It was incumbent upon defendant in the former case to present every defense he had. (Lorillard v. Clyde, 122 N. Y. 41, 19 A. S. R. 470; Harmon v. Auditor, 123 Ill. 122, 5 A. S. R. 502; Gould v. Sternburg, 13 A. S. R. 138; Haley v. Ano, 136 N. Y. 569, 32 A. S. R. 764.) The question of title may be tried in a trespass action where put in issue by the pleadings. (Watson v. Richardson, 80 N. W. 416, 80 A. S. R. 331; Hunter v. Holt, 21 A. S. R. 73; Flippen v. Dickson, 83 Tex. 421, 29 A. S. R. 653; Dodd v. Scott, 25 A. S. R. 492; Freeman v. McAninch, 47 A. S. R. 79; Chicago Co. v. Barrett, 96 N. E. 795, 15 Stand. Ency. of Proc. 545.)

POTTER, JUSTICE.

This action was brought in the District Court of Washakie county by A. T. Allen as plaintiff against W. O. Lewis as defendant, and upon a trial to the court without a jury

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judgment was rendered in favor of the defendant. Thereupon plaintiff filed and served notice of appeal, caused a record on the appeal to be prepared, and filed and served specifications of error, the latter appearing to have been filed with and as part of the record on August 17, 1917. Upon consideration of said specifications of error and a review of the record a new trial of the cause was granted by the district court on September 14, 1917, and thereupon the defendant filed and served notice of appeal, and the case is here upon that appeal from the order granting a new trial.

1. The first point urged in appellant's brief as ground for reversal is that the district court was without jurisdiction to grant a new trial at the time the order therefor was made, for the reason that it was after the time limited by statute for the granting of a new trial by the district court upon a consideration of the specifications of error and a review of the record on appeal. The statute authorizing the transfer of a cause to this court for review by direct appeal, so-called (Laws 1917, Ch. 32), provides in section 10 that the clerk of the district court shall, within five days after the specifications of error are filed in his office, notify the judge of the district court before whom the action was tried, in writing, that the record on appeal in the cause is perfected and on file in his office, and that it shall thereupon became the duty of such judge, within fifteen days after receiving such notice, to review the record on appeal and consider the specifications of error, and if he shall determine that the party appealing is entitled to a new trial of the issue he shall make and enter an order granting it, whereupon the record shall remain with the clerk of the district court for trial in that court, unless the respondent shall appeal from the order granting a new trial, in which event the record on appeal as perfected shall constitute the record on appeal in the cause. It is further provided in the same section, that if the district judge shall neglect or refuse to grant the appellant a new trial within twenty days from the date of the filing of the specifications of error the clerk shall thereupon transmit to the clerk of the supreme court the record on appeal and

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the specifications of error; and that in case the district judge shall, "within the time limited by this act", grant the party appealing a new trial and the other party shall appeal from such order, the clerk shall attach to the record on appeal, as prepared, said order and forthwith transmit the whole of such record to the clerk of the supreme court, and the party so appealing from the order granting a new trial shall be designated appellant and the opposite party respondent.

In preceding sections of the statute provision is made for taking an appeal from a judgment or order of a district court by filing and serving a notice to that effect within ten days from the entry of the judgment or order appealed from and for preparing and filing with the clerk of the district court a record on the appeal within a specified time which may be extended by the court or judge for cause shown, and for serving and filing with the clerk of the district court specifications of error within a stated time after the record is prepared and filed.

Complying with the provisions of section 10 aforesaid, prescribing what shall constitute the record when an appeal is taken from an order granting a new trial upon consideration of the specifications filed by the party appealing from the former judgment or order, the record prepared and filed in the district court for plaintiff's appeal from the judgment in the cause, including his specifications of error, with a certified copy of the order granting a new trial, defendant's notice of appeal from that order, and his specifications of error attached thereto, was transmitted to and filed in this court as the record on defendant's said appeal. But the plaintiff as respondent on this appeal has filed a suggestion of a diminution of the record and an application for leave to file as part thereof a certified copy of certain proceedings alleged to have been omitted from the record, and that matter was presented and submitted at the time the case was heard, and it was taken under advisement, together with the cause upon its merits. It appears from said application that after the order granting the new trial was made and entered

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the district court by another order, made upon the written application of the plaintiff, a copy of which had been served upon defendant's counsel, directed and declared the former order granting a new trial to be modified by adding thereto a recital of certain facts with reference to the time of the court's determination upon plaintiff's specifications of error, viz:

"That the specifications of error served and filed by the plaintiff in said action were taken up for consideration by this court within the time fixed by statute for the consideration of the same, to-wit, on the 3d day of September, 1917, and by oral stipulation entered into by H. W. Rich, Esq., attorney for the plaintiff, and Charles H. Harkins, Esq., one of the attorneys for the defendant, this court fixed the date for the hearing of said specifications of error on the 12th day of September, 1917, and beyond the time fixed by statute for the hearing and consideration of the same, and that the said specifications of error were heard and considered by this court after the time fixed by statute for the hearing and consideration of the same, by the consent of Charles H. Harkins, one of the attorneys for the defendant, and that the same was so heard and considered, as aforesaid, by the oral stipulation made between said attorneys in open court, and after the time fixed by the statute for the consideration of same."

It is stated in the order adding the above recital of facts to the previous order for a new trial that the truth of such facts was established by the evidence at the hearing of plaintiff's application for a modification of the former order and also that they were true of the court's own knowledge. The addition to the order of a recital of the facts aforesaid was not strictly a modification thereof, but an amendment, and was clearly intended to make the order show the facts of the consideration of the specifications of error and that the delay was by consent and application of the parties. The fact that within the time provided by the statute for considering the specifications of error the parties appeared and consented to a consideration thereof at a later time, or stipulated therefor, might have been shown by a separate journal

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entry as of the date when the parties so consented or stipulated and that the time for such consideration was fixed in compliance therewith, and those facts might properly have been recited in the order granting a new trial, to show the court's authority or jurisdiction, or a waiver of the parties as to time. And we think it was proper to amend the order so that such facts might appear therein, either at or after the term. (Sch. Dist. v. Western Tube Co., 13 Wyo. 304; 80 Pac. 155; Oak Hall Clothing Co. v. Bagley, 147 N. C. 37, 60 S. E. 648.) The fact that this appeal had been taken and the record filed in this court did not deprive the court of the right to amend the order by adding the facts aforesaid so as to make it speak the truth as of the time it was made and entered. (2 Cyc., 976; 15 C. J. 977; Guernsey v. Miller, 80 N. Y. 181; Bull v. Int. Power Co., 84 N. J. Eq. 209; 93 Atl. 86; Kvamme v. Barthell, 144 Ia. 418, 118 N. W. 766, 31 L. R. A. (N. S.) 207, and note.)

When the record was filed in this court the amendment aforesaid had not been made, and the clerk properly transmitted with the record previously prepared a certified copy of the order granting a new trial as originally made and entered. But whatever the effect of the later order amending the one found in the record, it is clearly proper that it should be brought into the record here upon the application of a party, and, since it is not required that the proceedings subsequent to the filing of the perfected record and specifications of error under the appeal disposed of by granting a new trial shall be authenticated by the certificates of the judge and clerk, as in the case of the original record, it is not necessary to return the record for correction, but, as provided by our rules (Rule 12) the omitted part may be made a part thereof by requiring the clerk to certify thereto or by granting leave to file a duly certified copy produced by a party applying therefor. The application of the respondent will, therefore, be granted, and the certified copy of the order aforesaid amending the order granting a new trial and of the application upon which it was made, the same having

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been produced at the time of the hearing, will be ordered field as part of the record on this appeal.

2. The question, therefore, of the trial court's jurisdiction to grant a new trial when its order therefor was made and entered is to be determined upon the facts now shown by the record, viz: That said order was made after the expiration of twenty days from the filing of plaintiff's specifications of error, but at a time which, within said twenty day period, had been agreed upon and fixed by stipulation of the parties in open court for the hearing and consideration of such specifications of error.

In discussing this question of jurisdiction counsel for appellant in their brief call attention to and cite authority in support of the principle that all requirements of the statute for taking and perfecting an appeal must be complied with, that they are jurisdictional, and that such jurisdiction cannot be conferred by consent. The point here, however, is not the jurisdiction of an appeal or that of an appellate court, but the authority or jurisdiction of the trial court to grant a new trial. It is expressly provided by section 11 of the statute aforesaid that this court shall not acquire jurisdiction over a cause appealed under its provisions until the record on appeal is filed with the clerk of this court. And it does not appear that any record for an appeal in the cause was filed in this court until November 12, 1917, following the filing in the district court, on September 24, 1917, of defendant's notice of appeal from the order granting a new trial, and the filing of his specifications of error on November 8, 1917. Hence this court had not acquired jurisdiction of the cause when the order of September 14, 1917, was made and entered granting a new trial, but all the jurisdiction that remained or existed in any court at that time was in the district court.

It is contended, however, that the provisions of section 10 requiring the district judge, within fifteen days after receiving the clerk's notice of the filing of the specifications of error on an appeal, to consider them and review the record, and to grant a new trial if he shall determine that the ap-

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pellant is entitled thereto, and that if such judge shall neglect or refuse within twenty days after such specifications are filed to grant a new trial the clerk shall thereupon transmit the record and specifications to the clerk of the supreme court are mandatory in effect as to the time for exercising the authority thereby given to grant a new trial, and that such authority ceases upon a neglect or refusal to grant a new trial within the said twenty day period.

These provisions do not merely confer or declare an authority to grant a new trial, they impose upon the district judge the duty to review the record and consider the specifications of error, and if he shall determine that the appellant is entitled to a new trial then to grant the same. And they indicate, together with the other provisions, that the purpose of the statute was not only to furnish a shorter and perhaps more easy method of appeal than by a proceeding in error, but also to expedite the final disposition of a cause. The statute did not repeal the provisions for the review of a cause upon a proceeding in error. On the contrary, it expressly declares, in section 15, that the direct appeal is provided for as a separate and independent method of reviewing civil and criminal causes in addition to the statutory provisions for reviewing such causes in the Supreme Court on proceedings in error. To obtain a review on proceedings in error, a bill of exceptions is often necessary, which requires time for its preparation, presentation and allowance. The statute providing for a so-called direct appeal dispenses with the necessity of a bill of exceptions by authorizing a transcript of the testimony certified to by the official court reporter as true and correct to be incorporated in the record, and also all original motions, demurrers, and instructions given and refused, together with the pleadings, verdict or findings, orders, and judgment. To have a matter considered in this court on a proceeding in error which could have been properly assigned as a ground for new trial in the court below, it must appear by bill of exceptions that the same was properly so presented, that the motion was overruled, and an exception reserved thereto. The direct appeal statute

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does not provide for making such a motion, but substitutes therefor specifications of error and the provisions aforesaid for a consideration thereof by the district court, without, however, requiring the record of any decision thereon unless a new trial be granted. That is to say, if a new trial is not granted so as to retain the cause in the district court the specifications of error will come directly before this court for consideration upon the submission of the cause here upon the record.

We know from the unwritten history of the statute in question that section 10 was not originally in the bill as prepared to be introduced at the 1917 session of the legislature, and that it was inserted upon a suggestion to the committee of the State Bar Association in charge of the matter that since the cause might not come before the district court on motion for new trial, that court should be afforded an opportunity to examine the specifications of error and grant a new trial if the appellant should be entitled thereto. It was thought that such procedure would not only afford the trial court an opportunity to discover and correct its own error, if any had been committed, but might also in some cases prevent a delay in the final disposition of the cause. And the obvious reason for fixing a time for such consideration by the trial court was to prevent the provision therefor itself causing unnecessary or unreasonable delay. And to further promote the purpose aforesaid, while providing for a review of the record by the trial court upon the specifications of error it is also provided that an appeal may be taken from an order granting a new trial, and upon the same record as to the proceedings prior to such order. But if the limitation as to the time specified for such review by the district court or judge should be held mandatory to the extent of excluding or debarring the right to waive it, the purpose of the statute to hasten final disposition might be defeated in some cases, while a construction allowing the time limitation to be waived cannot materially interfere with such purpose since the respondent on an appeal from the judgment may appeal directly from an order granting a new trial.

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An affirmative statutory provision relating to the time or manner of performing official acts unlimited or unqualified by negative words is generally considered as directory rather than mandatory, though it is a question of intention, to be ascertained from a consideration of the entire act, its nature and object and the consequences that might result from construing it one way or the other. (Lewis' Sutherland on Stat. Const., 2nd Ed., Sec. 610; 36 Cyc., 1157.) And with reference to courts of record or general jurisdiction, a statute limiting the time for a decision or judgment has frequently been held to be directory only. (Gomer v. Chaffe, 5 Colo. 383; Vermule v. Shaw, 4 Cal. 214; Board v. Murray, 44 Cal. 228; McQuillan v. Donahue, 49 Cal. 157; Rawson v. Parsons, 6 Mich. 401; James v. West, 67 O. St. 28, 65 N. E. 156.) So a requirement that opinions shall in all cases be filed before judgment pronounced was held directory. (Fraser v. Willey, 2 Fla. 116.) The Ohio case cited holds a statute requiring that any cause submitted on motion or demurrer shall be determined within thirty days after such submission to be directory merely, and that it did not deprive the court of jurisdiction. The court said that the object was to secure speedy action, and that to take away jurisdiction would cause intolerable delay. And in the Michigan case cited a statute was held directory which required a circuit judge trying a cause to give his decision on or before the first day of the succeeding term. In the Colorado case a statute requiring a motion for new trial to be filed and a decision thereon made at the same term the findings are made or verdict returned was held to be directory so far as it required the action of the court to be performed within a specified time.

There are no negative words in the statute under consideration, unless the provision for transmitting the record to this court upon the neglect or refusal of the district court to grant a new trial within the twenty day period is to be given that effect. But it is unnecessary to construe the provision under consideration as merely directory to sustain its jurisdiction to grant a new trial under the circumstances of

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this case after the expiration of the twenty day period, and we do not determine the effect of the limitation generally. If it is subject to waiver it was clearly waived in this case, for the postponement was by stipulation of the parties in open court. And we think it may be waived, and that when the time is extended by consent amounting to a waiver the record may properly be retained in the district court until the expiration of the time as so extended, so that if a new trial is granted within that time the record will then be retained for further proceedings as provided in the statute. And an appeal may be taken from the order granting a new trial as provided in the section, the same as if the order had been made within the twenty day period, though the time therefor will be determined by the date of the entry of such order. This, in our opinion, is in accord with the purpose of the provision and not inconsistent with its language as relating to a court of general jurisdiction possessing inherent power to grant a new trial, except as limited or regulated by statute. (See 1 Black on Judg., Sec. 297; 20 R. C. L. 218, 219; 14 Ency. Pl. & Pr. 932; DeVall v. DeVall, 60 Or. 493, 118 Pac. 843, 120 Pac. 13, 40 L. R. A. (N. S.) 291 and note, Ann. Cas. 1914A, 409 and note; Furman v. Furman, 153 N. Y. 309, 47 N. E. 577, 60 Am. St. Rep. 629; Hensley v. Davidson Bros. Co., 135 Ia. 106, 112 N. W. 227, 14 Ann. Cas. 62 and note p. 65; Niles v. Parks, 49 O. St. 370, 34 N. E. 735; Brenzinger v. Am. Exch. Bank, 19 O. C. C. 536; Volland v. Wilcox, 17 Neb. 46, 22 N. W. 71.) And that a limitation upon the time for granting a new trial may be waived is sustained by abundant authority. (Second Nat'l Bank v. Smith, 118 Wis. 18, 94 N. W. 664; Ward v. Smith, 166 Wis. 342, 165 N. W. 299; Gribble v. Livermore, 64 Minn. 396, 67 N. W. 213; Myers v. Stafford, 114 N. C. 231, 19 S. E. 232; Shipp v. Shelton, 193 Ala. 658, 69 So. 102; Smidt v. Third Dist. Court, 23 Utah 302, 64 Pac. 869; Houston Saengerbund v. Dunn, 41 Tex. Civ. App. 376, 92 S. W. 429; Keholy v. St. Ry. Co., 103 Ga. 363, 29 S. E. 712; and see Mayer v. Friedman, 44 N. Y. App. Div. 518, holding that the statutory time for a decision

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by a justice of the municipal court of city of New York may be extended by written stipulation, and Skaar v. Eppeland, 35 N. D. 116, 159 N. W. 707, deciding that where a motion for a new trial is duly noticed to be heard within the six months period allowed for appeal, and final hearing is postponed by consent of the parties or delay of the court in deciding the motion, the final character of the judgment is suspended so as to keep the action pending and subject to decision on the motion, under a statute providing that an action is deemed to be pending until final determination on appeal or until the time for appeal has passed.)

The Wisconsin statute declares that a motion for new trial upon the judge's minutes "can only be heard at the same term at which the trial was had", and that: "If such motion be made, but not decided during such term, it shall be taken as overruled." In the case of Bank v. Smith, supra, the court said:

"We are unable to agree with the contention that this provision is mandatory or jurisdictional in the sense that the parties may not waive its requirements. Its object evidently is to protect the parties to the action, not the public, to expedite business, and to insure an appellant against difficulties or embarrassments likely to result from inaction or neglect by the trial court. Were public policy or interests involved, the question would be quite different, but, where such a provision is imposed simply for the benefit of the parties, the principle is well settled that its benefits may be waived by those parties, if they choose."

3. Appellant further contends that the order granting a new trial is erroneous upon the pleadings and evidence in the case. The action was brought by the plaintiff Allen for an injunction to restrain the defendant Lewis from constructing a flume and ditch upon certain land of the plaintiff and for damages for trespassing upon the land in preparing for and commencing the construction of the flume. The action was commenced on April 28, 1917, and a temporary restraining order was issued on that date.

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The petition alleges plaintiff's ownership and possession of the land; that on or about April 27, 1917, the defendant entered thereon and wrongfully, unlawfully and maliciously carried thereon timber and lumber and commenced the erection of a flume on the land, threatening to continue the work and to dig a ditch across the land; and that plaintiff was damaged thereby in the sum of five hundred dollars. The answer contains four defenses separately stated and numbered. The first is a general denial of the allegations of the petition. The second alleges that defendant is the owner and in possession of a certain described tract of land; that on or about the year 1906, before the plaintiff had acquired the land claimed by him, and more than ten years before the commencement of the action, the defendant constructed the ditch and flume referred to in the petition with the knowledge, acquiescence and consent of the then owner of plaintiff's said land, and ever since continuously used the same for the irrigation of the land owned by him, until said ditch and flume were wrongfully destroyed by plaintiff in April, 1917. That the plaintiff purchased his land in April, 1915, with knowledge of the defendant's ownership of the ditch and flume, and charged with notice and knowledge of defendant's right of way for the same across said land, estopping the plaintiff from claiming any right against defendant's use and possession of the ditch and flume. The third defense alleges that for more than ten years preceding the commencement of the action the defendant was in open, notorious and exclusive possession of the ditch and flume and the right of way therefor.

The fourth defense is also pleaded as a cross-petition. It alleges: That more than ten years before the commencement of the action the defendant was and had continued to be the legal owner of a certain described tract of land,—the same as described in the second defense. That immediately after acquiring the land he enclosed it with a substantial wire fence, constructing it between his land and that of the plaintiff more than ten years before the commencement of the action upon a line agreed upon by de-

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fendant and the then owner of plaintiff's land as the division line between the two tracts, and that said fence was maintained by defendant until shortly before the commencement of this action. That on or about 1906, with the consent of the then owner of plaintiff's land and at an expense of about $700, and with the consent, knowledge and acquiescence of the then owner of the land described in the petition, defendant's said ditch and flume were constructed within the lines of his said enclosure, and thereafter continuously used for the irrigation of his land until shortly before this action was commenced. That plaintiff acquired his land in April, 1915, having then notice and knowledge of said fence, ditch and flume. That shortly prior to April 28, 1917, the plaintiff wrongfully and unlawfully tore down and destroyed the fence, ditch and flume, and removed the fence about sixty feet upon the premises of defendant, thereby placing the ditch and flume outside defendant's enclosure. That defendant has valuable crops of hay and grain growing upon his land, and has no other means of irrigating the same. After alleging other facts relating to the damage caused by the destruction of the ditch and flume, and perhaps the removal of the fence also, judgment is asked by the cross-petition for the amount of the damages alleged, that the temporary restraining order be dissolved and the plaintiff enjoined from entering upon the right of way for the ditch and flume, and from interfering with defendant's right thereto or his use and possession thereof; also that the line upon which the division fence was originally constructed be decreed to be the true division line between the lands of plaintiff and defendant, and that plaintiff be required to tear down and remove the fence wrongfully constructed by him on the land of defendant and reconstruct it upon the line where it was originally constructed.

Plaintiff by reply filed denies each and every allegation of the defenses set up in the answer, and for further reply alleges that each and all of the defenses and the cross-petition are barred by a former adjudication in an action in said district court instituted on September 30, 1916, by said

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Allen, the plaintiff herein, against said Lewis, the defendant herein, and decided by judgment rendered on February 7, 1917, in favor of the plaintiff, the reply setting out the pleadings and judgment in said action, and alleging that the judgment was rendered upon evidence introduced by the plaintiff and defendant respectively.

The evidence shows that plaintiff and defendant owned adjoining tracts of land, the plaintiff's land lying east and the defendant's land west of the dividing line. That defendant acquired his land by homestead entry in 1906, making final proof and receiving patent in 1912. That in 1906 he constructed a fence upon what he then believed to be the east boundary line of his land, but in fact the fence was built upon plaintiff's land about sixty feet east of the boundary line between the two tracts, thereby bringing within defendant's enclosure that part of plaintiff's land lying west of the fence and north of a river which, running in a northwesterly direction, crosses the land near the southwest corner thereof. That in the same year the defendant built a flume across the river and for some distance north of it about 300 feet, and a ditch connecting therewith, the flume and ditch north of the river being constructed close to and along the west side of said fence, and within defendant's enclosure at that time, though not upon his land, but upon said adjoining tract; the flume and ditch having been constructed for the purpose of conducting water upon defendant's land for the irrigation thereof, and so used until the destruction of that part of the flume north of the river in April, 1917, by the plaintiff, who had acquired title to his land in 1915. It also appears that prior to the said destruction of the flume the plaintiff had built a fence upon the true boundary line between his land and that of the defendant, and the evidence seems to permit the inference that it may have taken the place as a division fence of the one formerly built by the defendant, and that the latter may have been removed, though the fact whether or not it had been removed is not definitely shown. After the destruction of the flume the defendant went upon the land of plaintiff to reconstruct it, and his acts

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in that connection resulted in the bringing of this action. The defendant did not introduce or offer any evidence to establish the averments of his cross-petition relating to his fence. The facts aforesaid concerning that fence were brought out on plaintiff's cross-examination of the defendant and by the testimony of the plaintiff on rebuttal, the latter also referring to the fact that another fence had been constructed by the plaintiff on the proper boundary line.

To maintain his alleged right to the continued use and possession of the ditch and flume where it had been located and built the defendant testified that before building the same he went to see Mr. Douglas, then the owner of the land now belonging to plaintiff, and told him that he wanted to construct a ditch across "this land" and would have to cross him and asked him "if he had any objections to his building the ditch across his land", and that he said: "No, build the ditch where it is convenient." That based on that consent he went ahead and built the ditch, expending for that purpose about $700. That there was about 300 feet of flume and from that a dike clear across the land. He further testified that during all the time he had used the ditch and flume, neither Mr. Douglas, who died about 1908 or 1909, nor any subsequent owner of the land made any objection to said use by him, until the spring of 1917, when the plaintiff tore down the flume and "threw it over the fence on to my own land." That relying on such consent he also cleared, plowed and seeded about 35 acres of his land.

On cross-examination he was asked several questions concerning his testimony in the former action mentioned in the reply. The form of some of the questions seems to indicate that their object, in part, at least, was to show by what the defendant had testified to in the former action that the title to the ground upon which the part of the ditch and flume here in controversy was located was in dispute and an issue in that action. The testimony is also and we think more important upon another point in the case. The other action, as shown by the pleadings introduced in evidence on the trial of this case, was brought by the plaintiff Allen on Septem-

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ber 30, 1916, against the defendant Lewis, to recover damages for an alleged trespass upon plaintiff's land by wrongfully entering thereon on or about September 6, 1916, and cutting and removing hay and alfalfa seed growing thereon. The answer was a general denial. The allegations of the petition as to the trespass complained of were not confined to the strip of ground lying west of the boundary or division fence built by the defendant and crossed by the ditch and flume, and at one time within the defendant's enclosure, but, after describing certain land, including the tract adjoining defendant's land, and alleging that it was owned by plaintiff and in his possession, it alleged a wrongful entry thereon by defendant and the cutting and removal of the hay and alfalfa seed growing thereon and belonging to the plaintiff. The evidence in this case, however, tends to show that the alleged wrongful acts complained of in the former action occurred upon that part of plaintiff's land involved in this action, viz: The part immediately adjoining defendant's land on the east and lying west of the fence that had been built by defendant, and upon or across which he had constructed his ditch and flume; and it may be conceded that the evidence is sufficient to show that fact, if material and competent. The judgment in said former action recites that the cause was tried to the court, that witnesses on the part of plaintiff and defendant were sworn and examined, that the court found in favor of the plaintiff and that he was entitled to damages in the sum of $50.00, and it was ordered that the plaintiff recover that amount and costs.

Having thus stated the issues in the former action, as shown by the pleadings therein, and that there is evidence here showing upon what part of plaintiff's land the trespass occurred, we revert to the testimony of the defendant in this case upon cross-examination. We quote from the record that part of it deemed most important to be considered in determining the questions presented by this appeal from the order granting a new trial:

Q. "Your flume is located on Allen's land? A. Yes, sir. Q. Your ditch is on Allen's land, is it not? A. Yes,

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sir. * * * Was the ditch and flume within the inclosure that you claimed? A. Not all of it. * * * Q. Was the flume within the enclosure? A. At one time it was. Q. Was the ditch on the north side of the river within the inclosure? A. Yes, sir. Q. Where was the fence that inclosed this ditch? A. The fence was on the east side of the ditch along the bank. Q. That was also true of the flume, was it not? A. Yes, sir. * * * Now, Mr. Lewis, is this the same identical fence that you testified to being on the boundary line between you and Mr. Allen in the former action wherein you were defendant and Mr. Allen was plaintiff, being case No. 118? A. The fence wasn't on the boundary line. This is the same fence. Q. It wasn't on the boundary line? A. No, sir. Q. Did you testify in that action, No. 118, the case referred to, that you built that fence on the boundary line as you thought it? A. I built the fence. * * * Q. Did you testify in that action, being case No. 118, that you thought that you were building this fence on the line at the time you built it? A. Yes, sir. Q. Then, at the time you built the ditch you, of course, thought that you were building it on your own land? A. Which ditch do you mean? Q. The ditch north of the river? A. Yes, sir. Q. And you thought when you built the flume, it being west of the fence, that you thought that it was on your own land, did you not? A. Yes, sir. * * * Q. Now, Mr. Lewis, you thought that that flume and ditch was on your own land and thought that fence you built was the boundary line up until the time of this prior action, case No. 118, up to the trial of that case, did you not? A. What flume and ditch? The Court: Answer the question. You know what flume and ditch he is talking about. A. On the north side of the river, yes, sir. * * * Q. Now, Mr. Lewis, you are claiming in this suit the right to the possession of this land for the purpose of a flume and ditch because you have used it for a number of years without objection, are you not; in other words, you are claiming it because of your adverse possession? A. Yes, sir."

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The court sustained objections to questions inquiring if defendant's claim of adverse possession was presented by the evidence in the former suit and if the witness testified therein relating to such possession. The court also sustained an objection to a question asking if the witness did not testify in the former action that the only agreement or conversation he had with Mr. Douglas related to the building of the fence.

The plaintiff Allen and another witness were called on rebuttal, apparently for the purpose of showing that defendant's right to the possession of the land upon which the ditch and flume were located was an issue and adjudicated in the former action. And the plaintiff testified that on the trial of that action the defendant claimed all the land west of his fence for the reason that he had held it a number of years by adverse possession. He testified further to the following: That when the defendant as a witness on the trial of the former action was asked by his counsel if Mr. Douglas had given him permission to build the fence, he stated that "Mr. Douglas was satisfied with it, let him put it there", and that on cross-examination, when asked what his agreement with Mr. Douglas was, he stated that Mr. Douglas had seen him put the fence there and didn't say anything about it; and that when asked if that was all the conversation he had with Douglas about the possession of the land, the defendant answered that that was all the conversation they had, and that the defendant said when so testifying in the former action that he thought he was building the fence on the boundary line. The other witness testified substantially to the same facts, and stated that the question of the boundary line was brought up in that action, and the defendant claimed the land up to the fence he had built.

The court's conclusions of fact and of law were stated separately. The findings of fact included the following: That in 1906 Edward Douglas, who then owned the land upon which defendant's ditch and flume was constructed, gave the defendant his oral permission and consent to the construction thereof across his said land, whereupon the

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defendant, relying upon said consent and license, constructed said ditch and flume at an expense of $500 to $700, and thereafter continued to use the same for the irrigation of his land during each irrigating season until the spring of 1917, a period of more than ten years. That defendant's use and occupation of the ditch and flume and the right of way therefor was open, notorious, continuous and adverse during all of said period since the year 1906, as against said Douglas and his successors in interest. That in April, 1917, the plaintiff wrongfully destroyed the flume. That in a former action the plaintiff recovered judgment against defendant for $50 and costs for certain alfalfa and alfalfa seed wrongfully taken and appropriated by defendant from said land, in the action set forth in plaintiff's reply. That defendant was damaged in the sum of $50 by plaintiff's wrongful act in destroying the flume. That the court finds generally for the defendant on the issues joined herein, "except as to all matters pleaded by said defendant with reference to a so called line fence and adverse possession on account threof; on which issue defendant offered no evidence, and the court finds said issue against said defendant."

It was found as conclusions of law: 1. That by defendant's entry on the land of Douglas and the expenditure of money in constructing the ditch and flume the parol license became and was fully executed and thereafter irrevocable, so long as the use of the ditch and flume is necessary for irrigating defendant's land. 2. That by defendant's open, continuous, notorious and adverse use of the ditch and flume he has obtained title to the right of way therefor by adverse user. 3. That he is entitled to the exclusive use and occupation of the land necessary for the ditch and flume, during each irrigating season, and the right to enter upon the land of plaintiff for the purpose of rebuilding the flume and repairing and maintaining it and the ditch. 4. That the proceedings and judgment in the former action between the parties was not *res judicata* of the issues in this action. 5. That the temporary injunction was wrongly issued and ought to be dissolved. 6. That plaintiff as successor in

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interest to the title of said Douglas accepted the same charged with a right of way for defendant's ditch and flume. 7. That defendant is entitled to a decree in accordance with the findings of fact and law and to an injunction restraining the plaintiff from interfering with said ditch and flume. Thereupon the temporary injunction was ordered dissolved, defendant's title to the right of way quieted and confirmed, and plaintiff was enjoined and restrained from interfering therewith, and defendant was given judgment for $50, his said damages, and costs.

The specifications of error on plaintiff's appeal from the judgment challenged the findings and judgment as contrary to law and not sustained by sufficient evidence, and specifically each conclusion of law and most of the rulings on the admission and exclusion of evidence as error. The order granting a new trial from which the present appeal is taken assigns no specific reasons therefor; it recites merely that having considered the specifications of error and read the record and briefs and heard the arguments of counsel the court finds that the plaintiff is entitled to a new trial, and thereupon directs that the cause be tried *de novo*. But counsel have assumed that the ground upon which a new trial was ordered was or may have been that the court had erred either in the exclusion of evidence offered by the plaintiff upon the issue of *res judicata* or in the conclusion of law that the judgment in the former action was not *res judicata* of the issues in this case. Appellant's counsel, supposing that to have been the ground upon which the court acted, while disclaiming any knowledge concerning it, have confined their argument to a discussion of the issue of former adjudication raised by the reply, aside from a statement of the principles relied on to sustain defendant's alleged right to maintain the ditch and flume where it was constructed under a parol license; and they contend that the doctrine of *res judicata* is inapplicable to the facts in this case. Counsel for plaintiff and appellee, on the other hand, states that the new trial was granted upon the issue of *res judicata,* and contends that the plaintiff was entitled

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to a new trial because of error upon that issue. But whatever the information or supposition of counsel as to the ground inducing the district court to grant a new trial, since the record discloses nothing in that respect except that upon a consideration of the specifications of error and the arguments of counsel and a review of the record the court found that the plaintiff was entitled to a new trial, no ground can properly be excluded from our consideration that might be found sufficient to justify the order, if, indeed, the exclusion of any such ground would be proper under other circumstances.

It may be assumed or conceded for the purpose of this decision that in the previous action the defendant claimed and sought to establish by his evidence a right to the possession of the land west of the fence built by him and to the crop growing thereon, as the result of adverse possession on his part or the building of the fence with the consent or acquiescence of the then owner of the land, or both. But it does not appear that the ditch or flume were referred to in any way in the evidence produced upon the trial of the former action, or that the right of way therefor was in any manner involved in that action independently of the title to the land crossed by the ditch and flume or the right to its possession as determining the respective rights of the parties to the alfalfa growing thereon, and whether in cutting and removing the same the defendant had committed a trespass. Nor do we think it can be held, in view of the character and object of the former action, that defendant's alleged right of way for the ditch and flume, or his alleged right to maintain them across plaintiff's land, might or ought to have been pleaded in said action. That action was one merely for damages for an alleged trespass committed by cutting and removing the crop of hay or alfalfa growing upon the land, and it does not appear that any of such crop was growing in or upon or was cut from the ditch or any of the limited strip of ground essential to the right of way therefor. But if some part of the crop had been cut from the ditch or the banks thereof or any part necessary to the right of way, the

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fact that defendant had acquired a right of way for the ditch, either by adverse possession, agreement, conveyance, or in any other manner, would not necessarily give him a right to the produce of any part of the land, and would not require the defendant to plead as a defense to said action his alleged right of way for the purpose of protecting his claim thereto, since it could not have affected the decision in the case.

If the former action had been one to quiet the plaintiff's title to the land or to recover possession thereof a different question might be presented here. But so far as the title or possessory right to the land may have been involved in the former action it was evidentiary only, for the sole purpose of establishing the respective rights of the parties to the growing crops. But we do not think that the assertion of title by the defendant to the land in that action, through adverse possession or otherwise for the purpose aforesaid, would preclude him from alleging and claiming in this action a right of way for his ditch and flume not dependent upon his owning the land. For one may acquire a right of way for a ditch without having any other interest in the land. And without any title to the land or the right to its possession otherwise, the defendant might have acquired a right of way across it for his ditch and flume.

What we have said upon the issue of *res judicata* is not intended to apply to the fourth defense and cross-petition in the defendant's answer, so far as it relates to the fence built by defendant and its removal by the plaintiff, or the relief sought upon the averments as to that fence and defendant's possession of the land thereby, adverse or otherwise, or any averment other than those relating specifically to the ditch and flume. Defendant having offered no evidence in support of that defense and cross-petition except to show the building of the ditch and flume, its purpose and continued use, the circumstances under which it was located and constructed, its destruction by plaintiff and the damage caused thereby, and the court having found against the defendant upon all matters pleaded by defendant with refer-

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ence to the fence and adverse possession on account thereof, the effect of the judgment in the former action as a conclusive adjudication as to the title or right to possession of the land beyond the right to maintain and use the ditch and flume is not before us and has not been considered.

Upon the issues that are here our opinion is opposed to the contention of the respondent respecting the effect of the proceedings in the former action upon the claim of the defendant to a right of way for his ditch and flume. But the order granting a new trial must be affirmed upon other grounds. To justify a reversal, at least in the absence of a showing by the record of the specific reasons upon which the trial court acted, we should be able to say that there was nothing in the specifications of error which, upon their consideration and a review of the record, would entitle the plaintiff to a new trial. And we cannot say that. One of the grounds alleged in the specifications of error for a reversal of the judgment was that the evidence was insufficient to sustain the findings and judgment. When passing upon such a ground in considering the question of a new trial, the trial court is allowed a large discretion. (29 Cyc., 1008.) And we think that a new trial might properly have been granted on that ground alone.

The defendant testified, as stated above, that the owner of the land at the time the ditch and flume were constructed told him to build it where convenient, when he was asked if he had any objections to the construction of the ditch across his land. Upon that consent, and the subsequent acquiescence of such owner and his successors in the title, until the plaintiff destroyed the flume, and the expenditure of a substantial sum of money and the continuous use of the ditch and flume, the defendant bases his claim of a right of way; in other words, upon a parol license, alleged to have become irrevocable as the result of the subsequent conditions. But on cross-examination the defendant admitted that in the same year that he built the ditch, though whether before or after the ditch was constructed does not appear, he built a fence east of the ditch on what he supposed to be

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the division or boundary line between his land and the adjoining tract, thereby bringing the ditch and the connecting flume within his enclosure, and that it so remained until after the plaintiff acquired title to such adjoining tract, a period of at least nine years. And further, that he thought he was building the fence and the ditch and flume on his own land and that the ditch and flume were on his own land, until the trial of the former action. That trial is shown to have occurred by the recital of the judgment in the action in February, 1917.

If he located the ditch on the line originally intended when asking permission of the adjoining land owner to cross his land, the inquiry seems a natural one: Why did he ask such permission when intending to build it upon his own premises? If the consenting owner of the adjoining tract also thought that the line of the fence was the true boundary line, and that the ditch was on defendant's land, he might well have consented to its construction there without giving or intending to give a license to locate the ditch across his land. It is said that a license cannot be predicated on a mistake. (17 R. C. L. 573.) In the case cited in support of that statement, Schraeder Min. Co. v. Packer, 129 U. S. 688, it appeared that the plaintiff in error claimed that the consent of the defendant in error, Packer, to the running of a painted line to mark the boundaries between their timber lands amounted to a leave and license to the plaintiff in error to cut the timber up to that line; and upon that claim the trial court charged the jury "that the adoption of a boundary line by mistake had no element of license in it, and does not necessarily indicate intention on the part of either Packer to give, or of the Schraeder Company to receive, a license to cut and appropriate timber on Packer's lands."

The court said that they could not discover any error in that part of the charge. And, referring to certain Pennsylvania decisions cited by plaintiff in error, the court said further that in most of those cases the boundary line was agreed upon to settle a dispute, and in the others the party setting up the estoppel had been misled as to a material

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fact by the false or mistaken representation of the party making a claim inconsistent with such representation. And the case of Perkins v. Gay, 3 S. & R. 327, 331, is referred to and the remarks of Mr. Justice Gibson therein quoted as follows: "If the parties, from misapprehension, adjust their fences and exercise acts of ownership in conformity with a line which turns out not to be the true boundary, or permission be ignorantly given to place a fence on the land of the party, this will not amount to an agreement or be binding as an assent of the parties." The court said further:

"The decisions in the other states generally support the rule that owners of adjacent tracts of land are not bound by consent to a boundary which has been defined under a mistaken apprehension that it is the true line, each claiming only the true line, wherever it may be found, and that in such case neither party is precluded or estopped from claiming his own rights under the true one, when it is discovered. Nor can such consent in an action of trespass *quare clausum fregit,* upon the theory of leave and license given, operate as an estoppel upon the claim of the plaintiff to recover damages to the extent of the value of the timber taken, any more than it can under the plea *liberum tenementum* divest his title to land on which the alleged cutting and removal were committed."

It is, of course, possible that the adjoining landowner may not have acted under the same mistake as the defendant respecting the true boundary, but in the absence of direct evidence as to the understanding or belief upon which he acted, we think it would not be improper for the trial court to refuse to find that he gave his alleged consent with full knowledge of the location of the true boundary line, especially in view of the fact that defendant's fence was allowed to stand as marking the boundary line undisturbed and without objection until after the plaintiff acquired his title. The defendant having admitted that when constructing the ditch and flume and until February, 1917, he thought they were on his own land, it is difficult to understand upon what principle his expenditure of money in such construction

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and his continued use of the ditch can operate to give to the alleged consent of the adjoining landowner the character of an executed and irrevocable license.

A new trial might properly have been granted also upon the insufficiency of the evidence to sustain the finding of fact that defendant's use of the ditch and flume and the right of way was adverse during all of the period following its construction, and that said finding is contrary to law, in view of the fact that such use by him was not hostile to the owner of the land, since he claimed to have located the ditch and flume by the land owner's consent and permission and relied upon a license based thereon. (1 Cyc., 1030; Bryant v. Cadle, 18 Wyo. 64, 104 Pac. 23, 106 Pac. 687.) And that his claim of adverse possession was based entirely upon a possession under his mistaken belief that his own adjoining land extended to the division fence built by him. (Fieldhouse v. Leisburg, 15 Wyo. 207, 88 Pac. 214.)

The third and fourth findings of fact are inconsistent and also the first and second conclusions of law. By the third finding of fact the court finds that the defendant obtained from Edward Douglas his oral permission and consent to the construction of said ditch across the land of said Douglas, and thereupon, relying upon said consent and license the defendant entered upon the land of Douglas, and constructed the ditch and flume thereon. By the fourth it is stated that defendant's use of the ditch and flume was adverse as against said Douglas and his successors in interest. By the first conclusion of law the court found that by defendant's entry on the land of Douglas, and the expenditure of money in constructing the ditch and flume, the parol license became and was fully executed and thereafter irrevocable; and by the second conclusion of law, that the defendant by adverse use of the ditch and flume over the said land for a period of more than ten years had obtained title to the right of way. "A possession by permission or license from the owner is not adverse and cannot ripen into title, no matter how long continued or however exclusive it may be. The possession of the occupant under such circumstances is considered as

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the possession of him upon whose pleasure it continues." (1 Cyc., 1030; 2 C. J. 131.) While, as held in a number of cases, a possession permissive in its inception may nevertheless become adverse, there is nothing in this case to show that until the trial of the former action the defendant distinctly and openly disavowed the title of the owner with the latter's knowledge. (See 2 C. J., Sec. 210, p. 124.) It would be impossible to say, in view of these inconsistent findings, upon which theory, as between that of an executed and irrevocable license, and adverse possession, the judgment was given in favor of the defendant.

For the reasons stated, we conclude that the order granting a new trial must be affirmed, and it will be so ordered.

Affirmed.

BEARD, C. J., concurs.

BLYDENBURGH, J., being ill, did not participate in the decision.

STATE v. JEFFERIS.

(No. 966; Decided March 7th, 1919; 178 Pac. 909.)

OFFICERS — TERMINATION OF OFFICE — RESIGNATION — ACCEPTANCE — ELECTION OR APPOINTMENT OF SUCCESSOR — DISTRICT JUDGES — QUALIFICATION OF SUCCESSOR — RIGHT TO OFFICE — SERVICE IN UNITED STATES ARMY.

1. Under Const., Art. 4, Sec. 7; Art. 5, Sec. 19; Art. 6, Secs. 4, 7, and Comp. Stat., 1910, Sections 2084, 2090, 2112, 2276, 2277, the common-law rule of requiring an acceptance of a resignation by proper authority before it can become effective so as to divest an incumbent of the public office has not been abrogated in this state.
2. Under the rule requiring acceptance of resignation before it can become effective so as to divest an incumbent of office, acceptance may be manifested by the election or appointment of a successor by the officer, board, or body authorized to fill vacancies.
3. Under Const., Art. 5, Section 19, and Art. 6, Section 4, a district judge shall, unless removed according to law, exercise the duties of his office until his successor is duly qualified.

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4. Under Const., Art. 4, Sec. 7; Art. 5, Sec. 19, and Art. 6, Secs. 4, 7, and Comp. Stat., 1910, Secs. 2084, 2090, 2112, 2276, 2277, district judge, who during term of office entered the service of the United States as a major in the Judge Advocate General's Department, upon returning to and resuming the office of district judge was a *de jure* and not a *de facto* judge, where he had not resigned and his office had not been declared vacant and no successor had qualified.

ORIGINAL proceedings for mandamus by the State of Wyoming on the relation of Ernest C. Raymond against I. C. Jefferis, State Auritor of the State of Wyoming.

Lacey & Lacey, Lafleiche & Diefenderfer, and *Kinkead & Henderson,* for relator.

Relator is the *de jure* judge of the Seventh Judicial District of Wyoming and entitled to the salary and perquisites thereof. A resignation of a public officer is not complete unless accepted and an appointee has qualified to fill the vacancy. Acceptance by relator of a federal appointment did not *ipso facto* create a vacancy in the office, but was merely an implied resignation, which, not having been accepted by the governor and no appointment made to supersede the relator, he is still *de jure* judge. Relator having been discharged from the army and resumed the office of judge before his implied resignation was accepted, such resignation was withdrawn and cannot be relied upon to work a forfeiture of the office. Primary jurisdiction being vested in the governor to determine whether a vacancy exists, it is incompetent for an inferior officer to declare a vacancy and refuse the issuance of a salary warrant earned by such officer, until a vacancy has been lawfully declared and acted upon, it is not only the right of the incumbent to perform the functions of the office, but his duty to do so is mandatory. The foregoing propositions are sustained by the common law rule and a fair construction of our Constitutional provision. The acceptance of an incompatible state office does not work a forfeiture of the first office, unless the vacancy be declared filled by proper authority. (Const., Art. VI, Sections 4, 7; also Art IV, Section 7, and Art. V, Section

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19.) The provisions of the Statute are applicable, Section 2112 Comp. Stats. 1910. After an office has been assumed, it cannot be laid down without the consent of the appointing power. (People v. Green, 58 N. Y. 304; State v. Anderson, 155 Ia. 271, 136 N. W. 128.) The term "unless removed according to law" means removal by some process provided by the Constitution or statute. (Trumble v. People, 34 Pac. 981, 41 A. S. R. 236; United States v. Irwin, 127 U. S. 125; Badger v. United States, 93 U. S. 599; Rex v. Patterson, 24 Eng. Com. Law 15.) Resignation does not take effect so as to create a vacancy until such resignation is accepted by authority. (Reiter v. State, 51 Ohio State ——, 23 L. R. A. 681; United States v. Justices, 10 Fed. 460; United States v. Green, 53 Fed. 769; State v. Herman, 11 Mo. App. 43; Edwards v. United States, 103 U. S. 471, 26 L. Ed. 314; State v. Clayton, 27 Kan. 442; Hoke v. Henderson, 4 Dev. 1; State v. Henderson, 4 Wyo. 535; DeTurk v. Comm., 129 Pa. St. 151.) The following authorities sustain the principle that even where the Constitution or statute provides that upon the happening of a certain tenure or failure to do a certain thing within a particular time, there shall be a vacancy, such requirements are directory only and if in the interim, no appointment has been made, the omission may be cured by the officer subsequently qualifying. (Chic. v. Gage, 95 Ill. 593; People v. Hawley, 12 Wend. 481; State v. Churchill, 41 Mo. 41; State v. Porter, 7 Ind. 204; Ross v. Williamson, 44 Ga. 501; State v. County Court, 44 Ga. 230; Kearney v. Andrews, 10 N. J. Eq. 70; Cronin v. Gundy, 16 Hun 520; State v. Toomer, 7 Rich 216.) The governor as a coordinate branch of the government may not be required by the judiciary to declare a vacancy in an office. (Sutherland v. Governor, 29 Mich. 320.) Inasmuch as Art. VI, Section 7, of the State Constitution is involved, attention is invited to Art. 1, Section 37, of the Constitution declaring Wyoming to be an inseparable part of the federal union and the Constitution of the United States the supreme law of the land. Congress is vested with power to declare war. The relator was com-

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missioned a major in the Judge Advocate General Department, while the government was engaged in war. A question arises as to whether Section 7 of Art. 1, State Constitution, applies in time of war. Relator did not forfeit his office when he enlisted, for the reason that under the Selective Service Law of May 18, 1917, he was subject to draft. In such an emergency the common law doctrine of forfeiture and the decisions relating thereto do not apply. The Selective Service Law has been declared constitutional. The regulations promulgated thereunder have been sustained by the courts. (Ex parte Beck, 245 Fed. 967; United States v. Casey, 247 Fed. 362.) A war emergency requires the enactment of laws that may come in contact with State laws and constitutions and in that event the acts of congress must prevail. (State v. Burton, 103 Atl. 962.) Inasmuch as a Selective Service Law has pressed the sheriffs and clerks of counties into the service as draft officers, it would be absurd to say that the acceptance and performance of such service operated to vacate their offices. The Selective Service Act provides (section 14) that all laws in conflict are sustained during the period of the war emergency. It may be fairly contended that Section 7 of Art. VI, of the State Constitution comes within this class and should not be literally construed. Louisiana has a similar provision in its constitution. In the case of State v. Jos., 78 So. 663, the question was raised as to the eligibility of a jury commissioner who had become a member of a local draft board and where it was contended that the latter service *ipso facto* vacated his office. The court in passing upon the question held that the ground of jury challenge was not well taken. The principle was recognized in the case of In re. Landous Estate, 171 N. Y. S. 981, which involved the purchase of liberty bonds by testamentary trustee in violation of the provisions of a will in respect to investment.

W. L. Walls, Attorney General, and *D. A. Preston, of Counsel,* for respondent.

The Constitution, Art. V, Section 27, renders judicial officers ineligible for other than judicial offices during the

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term for which elected. Under this provision a judge who accepts an office other than a judicial office during his elective term *ipso facto* vacates the first. A person holding an office, to which a salary, fee or perquisite is attached, who accepts an office of trust or profit under the United States *ipso facto* vacates the first office. (Art. V, Section 7, State Constitution.) And this is the common law rule. When an officer holding an office accepts and has been inducted into a second office incompatible to the first, his title to the first terminates and cannot be renewed by his subsequent resignation of the second. After the first office becomes vacant, the former incumbent cannot be restored to it by his own act, and the rule applies whether the offices are incompatible, or not, if the Constitution forbids the same person to hold both at the same time. (Mechem on Pub. Off., Secs. 420-429-431; Atty. Genl. v. Oakman (Mich.) 86 Am. St. Rep. 574; State S. C. v. Buttz, Vol. 9, S. C. 156; State, ex rel. Buttz v. Comptroller General, 9 S. C. 259; Shell v. Cousins, 77 Va. 328; State ex rel. v. Thompson, 122 N. C. 493; State ex rel. v. Bus, 135 Mo. 325; State of Nevada ex rel. v. Sadler, 25 Nev. 131; Oliver v. Jersey City, 63 N. J. L. 96-632; State v. Goff, 15 R. I. 505; Beincourt v. Parker, 27th Tex. 558; People ex rel. v. Brooklyn, 77 N. Y. 503; Campbell v. Hunt, 162 Pac. 88; In re. Martin, 1st Winton N. C. 153; People ex rel. Marshall v. Leonard, 73 Cal. 230; Bishop v. State, 149 Ind. 223; Ryan v. Cottell, 15th Iowa 538; State v. Joseph, 78 So. 663; Selective Service Act, May 18, 1917, with supplementary and amendatory acts and resolutions thereto.) A *de facto* officer cannot recover a salary or compensation. (Mechem on Public Officers, Pg. 221.) While the acts of the *de facto* officer are valid as to third persons, he cannot himself acquire rights based on his defective title. (22 R. C. L., Sec. 321; Peterson v. Benson, 112 Pac. 801; Rasmussen v. Commissioners, 8 Wyo. 207; State v. Comptroller, 9 S. C. 259.) Counsel for relator advanced the startling assumption that Section 7, Art. VI, of the State Constitution is suspended in war time. As well might it be contended, that the entire instrument is suspended

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during the war emergency. The contention is absurd for the reason that the integrity and force of state laws and constitutions is certainly of as much importance and necessity as the Selective Draft Act, of which so much has been said. On the one hand, it is claiming for relator that he is willing to lay down his life to maintain constitutional government and on the other that he should not be bound by the principles of constitutional government. Nor can the argument of brief tenure of service in the army logically affect the question, or have anything to do with the case. If the contention of relator's counsel that the resignation of a holder of office does not go into effect until his successor is elected or appointed be accepted as sound, we would seem to be placed in a strange predicament, since we have a constitution making the holding of office unlawful on one hand and a law compelling the holding of an office by the person whom the constitution forbids to hold it, on the other hand. Relator admits that he held an office of trust and profit under the United States from September 14th to December 6th, 1918, and is here claiming that he held and still holds an office in this state of trust and profit to which a salary attached during the same period. He thus brings himself directly within the class of things and persons prohibited by the Constitution. The authorities are uniform in holding that one who while lawfully occupying one office, who lawfully accepts a second, which is prohibited or incompatible *ipso facto,* renounces and vacates the first. (1st Winton, 162; 15 Iowa 538; 77 Va. 528; 60 N. C. 163; 122 N. C. 193; 60 N. C. 153; 195 Me. 195; 15 R. I. 505.) An office is vacant when it is ascertained that there is no competent incumbent. Nothing further need be done. No amotion is necessary. (135 Mo. 325; 27 Tex. 508; 77 N. Y. 503; 77 Va. 328; 25 Nev. 132.) Because there was no incumbent to the office when he returned September 8, 1918, gives him no right to the office, nor any right to move in and take possession of it, and because he did move in and take possession, gives him no right to the salary attached to it. He is neither a *de jure* nor a *de facto* officer. (Mechem on Public Offices,

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Sec. 321; for definition of *de facto* officers, see Butlers, C. J., definition.) When the prohibition operated, the salary of the State office ceased. (15 Iowa 548; 45 Mo. 355; 9 S. C. 259.) The question of *de facto* officer does not arise in this case. It is a case where the sovereign refuses to recognize the right or title of the office or to compensation for pretending to render services in connection therewith. The facts stated and the law applied thereto conclusively show that the relator had no right to compensation. This court should not require the respondent to do an unlawful and improper thing.

POTTER, JUSTICE.

This is an original proceeding in this court, wherein it is sought by writ of mandamus to require the State Auditor to issue a warrant for the salary claimed by the relator as district judge for the period between the 9th and the 31st days of December, 1918, both inclusive, the relator's claim for the amount which would be due and payable to one entitled to such salary for that period having been presented to and rejected by the Auditor.

The case was submitted upon a demurrer to the petition, but under an agreed statement of facts taking the place, for the purpose of the demurrer, of the original averments of the petition. The only question is whether the relator, who had been regularly elected to the office of Judge of the Seventh Judicial District at the general election in November, 1916, for the term of six years, and qualified and entered upon the discharge of the duties of the office, as provided by law, on the first Monday in January, 1917, vacated the office so as to deprive him of the right to the salary claimed for the period aforesaid by accepting an appointment as Major in the United States Army in the Department of the Judge Advocate General, and performing the duties of that office from September 23, 1918, when he took the oath required of officers in the United States Army, until December 6, 1918, when his resignation as such officer in the army was accepted and he was honorably discharged, notwithstanding

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that on December 9, 1918, he returned to his home in said judicial district and resumed the discharge of the duties of the office of said judge, and has continued since that time to discharge such duties as the only incumbent and claimant of the office, and that during his absence the business of the court and the judge thereof was attended to by the judge of the fourth district under an order calling upon him generally to transact such business.

The relator was within the age subject to the last draft under the Selective Service Act, and duly registered therefor on September 10, 1918, with the local registration board of his county. In June, 1918, he had applied for a commission as Major in the Judge Advocate General's Department, and on September 13, 1918, he was notified that a commission as Major in said department had been issued to him, and on the 14th day of that month he accepted the appointment. On that day also he made an order as district judge and caused the same to be entered upon the journal of the district court in each county of his district, calling upon and authorizing the judge of the Fourth Judicial District to transact any and all business and perform any and all duties devolving upon the judge of the said seventh district, pursuant to which order Judge Burgess of the fourth district did transact the business of the judge of the seventh district during the relator's absence.

Having thereafter received a telegram from the proper authorities directing him to report for service as Major, he took the required oath at Washington on September 23, 1918, and entered upon the performance of the duties of Major in said Department of the Army, and continued in the performance of such duties until his resignation was accepted on December 6, 1918, and during the period of such service received the pay of Major in said department.

The office of judge of said Seventh Judicial District has not been declared vacant, and no proceedings have been instituted to declare the same vacant, nor has the relator formally resigned the office or been removed therefrom. But he is the sole incumbent of the office and the only per-

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son claiming it, no appointment or other selection for the office having been made during the relator's absence, or since his return.

The relator, up to the time of the hearing of this case, had not received any paper or writing purporting to be a commission as Major, or any written evidence of a commission, but was informed that a commission had been prepared and was awaiting the signature of the proper officer.

The relator, prior to January 4, 1919, presented a claim for salary as district judge for the months of October, November and December, 1918, which claim was rejected by the auditor, and thereupon he presented his claim for salary for the period aforesaid, viz: From December 9 to December 31, 1918, which was also rejected, and is the claim here involved. And while asserting in the petition in this case that he is lawfully entitled to the salary for the period of his said absence from the State, he expressly waives all claim and right thereto for said period by statements to that effect in the petition and the agreed statement of facts.

It may be conceded that if relator's acceptance of the office of Major in the United States Army created an immediate vacancy in the office of judge of the seventh district, so that he was no longer the lawful incumbent thereof, he could not by his own act in resuming the discharge of the duties of the office reinstate himself therein, with the same effect respecting the title to the office as if such vacancy had not occurred. But, upon the facts, was such a vacancy created? It is contended on the part of the auditor that a vacancy was created which terminated relator's right and title to the office. And that contention is based upon the rule of the common law that the acceptance of a second office incompatible with one already held *ipso facto* and absolutely vacates the first, without the necessity of any proceeding to determine the title thereto, and a provision of the Constitution of this State declaring, in effect, that an office of profit in this state and an office of appointment of trust or profit under the United States are incompatible. The provision

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of the constitution thus relied on in support of said contention is found in Section 7 of Article VI, under the subhead "Elections", as the constitution is now published in the Compiled Statutes of 1910, and was published in the Revised Statutes of 1899, and the section reads as follows:

"No member of congress from this state, nor any person holding or exercising any office or appointment of trust or profit under the United States, shall at the same time hold or exercise any office in this state to which a salary, fees or perquisites shall be attached. The legislature may by law declare what offices are incompatible."

There are other provisions of the constitution which must also be considered in determining the question. Section 4 of the same article (VI), and under the same subhead, "Elections", reads as follows: "Every person holding any civil office under the state or any municipality therein shall, unless removed according to law, exercise the duties of such office until his successor is duly qualified, but this shall not apply to members of the legislature, nor to members of any board of assembly, two or more of whom are elected at the same time. The legislature may by law provide for suspending any officer in his functions, pending impeachment or prosecution for misconduct in office."

By Section 19 of Article V it is provided that each district judge shall be elected for the term of six years from the first Monday in January succeeding his election *and until his successor is duly qualified.* And Section 7 of Article IV provides: "When any office from any cause becomes vacant, and no mode is provided by the constitution or law for filling such vacancy, the governor shall have the power to fill the same by appointment."

There are also some statutory provisions seeming to be pertinent to the inquiry. It is provided by Section 2112, Comp. Stat. 1910, as follows: "Whenever it is alleged that a vacancy in any office exists, the officer, court or county board, whose duty it is to fill the vacancy by appointment or to order an election to fill such vacancy, shall have power to determine whether or not the facts occasioning such vacancy

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exist." And by Section 2276 it is provided: "Resignation of elective offices shall be made to the officer, court or county board authorized by law to fill a vacancy in such office by appointment or to order an election to fill such vacancy." Section 2277 declares that an elective office shall become vacant on the happening to the incumbent before the end of his term of either of the following events: 1. His death. 2. His resignation. 3. His becoming insane or *non compos mentis*. 4. His ceasing to be an inhabitant of the state, district, town, ward or precinct for which he was elected. 5. His conviction of an infamous crime or of any offense involving a violation of official oath. 6. His removal from office. 7. His refusal or neglect to take his oath of office, or to give or renew his official bond, or to deposit or file such oath or bond within the time prescribed by law. 8. The decision of a competent tribunal declaring his election void. The acceptance of a second incompatible office is not mentioned in Section 2277 as a fact or event constituting a vacancy, nor is there any provision in the constitution or statutes directly declaring the effect of such a condition.

Section 2084, prescribing that certain officers shall be elected at general elections to be held on the Tuesday next after the first Monday in each even numbered year, includes the following: "all state and district executive and judicial officers which are made elective by law, whenever there is a vacancy in any state or district executive or judicial office, * * * ; Provided, however, That whenever a vacancy in any state or district office as aforesaid shall occur less than twenty-five days prior to such election, then, in that case, at such election no person shall be elected to fill such vacancy." And by Section 2090 it is provided that a vacancy occurring in the office of district judge, for any cause whatever, "shall be filled at the general election, when such vacancy shall be required to be filled by law or the constitution of this state."

There being no other provision of law for filling a vacancy in the office of district judge, except by election when the vacancy occurs more than twenty-five days prior to a general election, the governor is authorized by Section 7 of Article

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IV of the constitution to fill such a vacancy by appointment until a successor is regularly elected and qualified. If a vacancy was immediately created in the office held by relator upon his acceptance and assuming the duties of the office of major in the army on September 23, 1918, then it occurred more than twenty-five days prior to the general election in that year. But as a successor was not elected and no appointment was made, the office appears to have been treated as not vacant.

The generally accepted ground of the common law rule that an office is *ipso facto* vacated by the acceptance of another office incompatible with it is, that such acceptance of the incompatible office amounts to an implied surrender or resignation of the first office. In Rex v. Patterson, 4 Barn. & Adol. 9 (24 End. C. L. Rep. 15), decided in 1832, it is said:

"In the earlier textbooks and authorities, the ground upon which the acceptance of an incompatible office avoids another is not distinctly explained. In the cases, however, of Gage v. Peacock, Noy 12, and Verrior v. The Mayor of Sandwich, 2 Keb. 92, it appears to have been argued on the ground of an implied surrender; and in some more modern cases, where the first office is clearly avoided, the reason expressly stated is, that it operates as an implied *surrender* of the former office, or an *amotion* from it. In Rex v. Trelawney, 3 Burr. 1615, Lord Mansfield puts it on the former ground; and that opinion is adopted by Buller, J., in Milward v. Thatcher, 2 T. R. 87. Lord Kenyon in Rex v. Pateman, 2 T. R. 777, puts it on the latter. See also the opinion of Littledale, J., in Rex v. Hughes, 5 B. & C. 886."

Following which, the court, by Parke, J., said: "If this view of the subject be correct, it seems to follow that the acceptance of the second office will not absolutely avoid the first, unless it be made by, or with the privity of, that authority which has the power to accept the surrender of the first or to amove from it. Upon reference to the authorities it will be found that in most, if not in all cases where the office has been held to be *absolutely void,* a surrender to and

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acceptance by the same person who appointed to the second office, or an amotion by them, would be good. * * * Upon principle, not conflicting with any of the authorities, it seems that an officer cannot avoid his office by accepting another, unless his office be such as he could determine by his own act simply, or unless that authority concurs in the new appointment, which could accept the surrender of, or amove from, the old one."

And it was held in that case that the general rule aforesaid, that the acceptance of an incompatible office absolutely avoids a former office, is not applicable under all circumstances, regardless of the authority appointing to the second office, "but that it must be limited and qualified, and that such acceptance (though it may be ground of amotion) does not operate as an *absolute avoidance* in those cases where a person cannot divest himself of an office by his own mere act, but requires the concurrence of another authority to his resignation or amotion, unless that authority is privy and consenting to the second appointment"; the court saying, immediately preceding the statement of the necessary limitation of the rule, that, "it would be an anomaly in the law, if a public officer who could not directly resign, or be amoved without the concurrence or privity of a superior authority, should be able to accomplish the same object indirectly by an acceptance of an incompatible office." And the same principle limiting the general rule as stated was again announced and applied in Worth v. Newton, 10 Exch. (Hurlstone & Gordon) 247, decided in 1854; the court, again by Parke, J., after stating the fact that the appointment to the second office was not by the same authority that could accept a resignation of, or remove from, the former office, saying: "In this case, therefore, there is no implied amotion from the old by appointment to the new office for the authority appointing to that office could not remove; nor any implied surrender, because the same authority could not accept a surrender of the old office." And it was pointed out that the statute provided that the incumbent of the office claimed to have been vacated shall continue in that office

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until he shall *resign* such office, or until a specified authority shall revoke it.

This exception to the general rule is also stated in Mechem on Public Officers (Sec. 421), wherein it is said: "But an exception is made to the general rule in those cases in which the officer cannot vacate the first office by his own act, upon the principle that he will not be permitted to thus do indirectly what he could not do directly," and that such an acceptance (of an incompatible office) is held not to operate as an absolute avoidance in those cases where to divest an incumbent of an office requires the concurrence of another authority to his resignation or amotion, unless that authority is privy and consenting to the second appointment. Said exception is also recognized and stated on page 580 of 86 Am. St. Rep., in the elaborate note to the case of Attorney General v. Oakman. It was applied in State ex rel. v. Nobles, 109 Wis. 202; the exception being held decisive of that case, where the law expressly provided that the officer shall continue to hold his office until his successor is chosen and qualified, on the ground that the office would not become vacant by resignation until a successor had been chosen and had qualified, thus putting it out of the power of the officer to divest himself of his office by his own act.

In State v. Brinkerhoff, 66 Tex. 45, 7 S. W. 109, the general rule was applied in a *quo warranto* proceeding to oust the respondent from an office claimed to have been vacated by the acceptance of another office incompatible with it, but it appeared that the respondent's appointment to the second office was by the authority authorized to order an election to fill a vacancy in the first office, and it was said that such appointment was equivalent to an agreement to accept the resignaion of the other office held by the appointee, so that "upon his qualification under the appointment, the resignation has full effect, and the office formerly held becomes vacant in all cases in which the two offices cannot be held by the same person." But in the case of Jones v. City of Jefferson, reported in the same volume of the Texas Reports (66 Tex. 576) it was held that the in-

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cumbent of an office had not divested himself thereof, where his resignation had not been tendered to the proper authority and accepted, and no successor had been elected.

In declaring the above exception to the general rule, in Rex v. Patterson, and Worth v. Newton, *supra,* it is clear that the court had in mind the doctrine of the common law that a resignation of a public office is not complete until accepted by the proper authority. That principle of the common law was referred to by the Supreme Court of the United States in Edwards v. U. S., 103 U. S. 471, as follows: "As civil officers are appointed for the purpose of exercising the functions and carrying on the operations of government, and maintaining public order, a political organization would seem to be imperfect which should allow the depositaries of its power to throw off their responsibilities at their own pleasure. This certainly was not the doctrine of the common law. In England a person elected to a municipal office was obliged to accept it and perform its duties, and he subjected himself to a penalty by refusal. An office was regarded as a burden which the appointee was bound, in the interest of the community and of good government, to bear. And from this it followed of course that, after an office was conferred and assumed, it could not be laid down without the consent of the appointing power. This was required in order that the public interests might suffer no inconvenience for the want of public servants to execute the laws (citing cases). This acceptance may be manifested either by a formal declaration, or by the appointment of a successor. 'To complete a resignation,' says Mr. Willcock, 'it is necessary that the corporation manifest their acceptance of the offer to resign, which may be done by an entry in the public books, or electing another person to fill the place, treating it as vacant.' Wilcock, Corporations, 239."

And, continuing, the court said: "In this country, where offices of honor and emolument are commonly more eagerly sought after than shunned, a contrary doctrine with regard to such offices, and, in some states, with regard to offices in general, may have obtained; but we must assume that the

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common-law rule prevails unless the contrary be shown." Proceeding with a discussion of the case, which depended upon the laws of the State of Michigan, it was said that a contrary rule was not found to have been adopted in that state, but, on the contrary, the common law rule seemed to have been confirmed by its statutes. Various provisions of the Michigan statutes were then referred to, among them being a provision that resignations of officers elected at township meetings must be in writing, addressed to the township board, who is authorized to make temporary appointments to fill vacancies; that resignations of other officers are directed to be made generally to the officer or officers who appointed them, or who may be authorized by law to order a special election to fill the vacancy, and that if any person elected to a township office (except that of justice), and of whom an oath is required, and who is not exempt by law, shall not qualify within ten days, he is subjected to a penalty of ten dollars. "These provisions," the court said, "indicate a general intention in conformity with the principles of the common law." And, further, that the same intention was manifested by the section of the statute which provided that each of certain officers "shall hold his office for one year, *and until his successor shall be elected and duly qualified.*" And also by a provision of the statute declaring, like a statute of this state above cited, that every office shall become vacant upon the happening of certain events, including "his resignation", which was held not to manifest a departure from the common law requirement, since it was nowhere declared in the statute when a resignation shall become complete. For those reasons, it was held that the resignation of a public officer was not complete in that state until accepted by the proper authority, either formally, or by something tantamount thereto, such as the appointment of a successor.

The case thus referred to is the leading American case on the subject, and, in the absence of statute expressing or implying a contrary intention, the rule best sustained by authority in this country seems to be that a resignation does

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not become effective until accepted by competent authority, "either in terms, or by something tantamount to an acceptance, such as the appointment of a successor." (22 R. C. L. Sec. 260, p. 557, and cases cited; Fryer v. Norton, 67 N. J. L. 537, 52 Atl. 476; State ex rel. Royse v. Superior Court, 46 Wash. 616, 91 Pac. 4, 12 L. R. A. N. S. 1010, 123 Am. St. Rep. 948, 13 Ann. Cas. 870, and note.) Mechem, in his work on Public Officers, declares that the common law principle requiring an acceptance of a resignation by competent authority to divest an incumbent of his office by resignation, prevails in many of the United States, though not in all, and, except where there is a statutory provision to the contrary, is supported by the weight of both reason and authority. (Sec. 414.) And in section 416 it is said that where the law expressly provides that an officer shall continue to hold his office until his successor is chosen and qualified, he continues in office, notwithstanding an acceptance of his resignation, until such successor is chosen and qualified, citing Badger v. U. S., 93 U. S. 599, 23 L. Ed. 991; Jones v. Jefferson, 66 Tex. 576, 1 S. W. 903; People v Barnett Tp., 100 Ill. 332.

The limitation of the general rule vacating an office upon the acceptance of another incompatible with it by excepting therefrom those cases where a person cannot divest himself of an office by his own act, unless the authority that must concur therein is privy and consenting to the second appointment, appears to have been referred to in only a few of the cases in this country applying the general rule, but the reason seems to be that most of such cases did not involve facts making the exception applicable. In the majority of the cases declaring and applying the general rule there had been an election or appointment to the office claimed to have been vacated, or the proceeding was in *quo warranto,* or of that character, to determine the question of vacancy. In a New Jersey case, where the rule was applied, State ex rel. Clawson v. Thompson, 20 N. J. L. 689, the exception announced in Rex v. Patterson, *supra,* was referred to, but held not to be applicable to the facts in the case for the

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reason that "both appointments emanated from the state; the first was conferred by the legislature, then in session; and the second by the governor, during the recess of the legislature, and to fill a vacancy. Both were conferred and held under the authority of the state—one and the same authority—differing only in the form of appointment." And the court said: "If we adopt the rule then, as laid down in Rex v. Patterson, no formal resignation of the office of prosecutor was necessary to avoid the office; but the acceptance of the Attorney Generalship was, in itself, an avoidance of it."

And in a case much relied upon by the Attorney General, representing the respondent, State ex rel. v. Bus, 135 Mo. 325, 36 S. W. 636, 33 L. R. A. 616, the exception was stated but held inapplicable in that state for the reason that the constitution recognized an officer's right to resign, without the concurrence of the officer or body having the power to act upon the resignation, the court saying: "Whatever doubt may exist in some jurisdictions as to the right of a public officer to resign his office without the concurrence of the officer or body which has the power to act upon it, all doubt is removed in this state by a constitutional recognition of the right. The constitution (sec. 5, art. 14) declares: 'In the absence of any contrary provision, all officers now or hereafter elected or appointed, subject to the right of resignation, shall hold office during their official terms, and until their successors shall be duly elected and qualified'."

The exception was mentioned also in State v. Butz, 9 Rich. S. C. 156, involving the title to the office of circuit solicitor upon the incumbent's acceptance of a federal office, the court stating that the exception was not necessary in the United States, where everyone is free to accept or resign any office without the permission or acquiescence of the sovereign power. But that case was decided before the decision in Edwards v. U. S., *supra,* announcing a contrary doctrine, as to the right to vacate an office by resignation under statutes like those in this state.

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And in Lowe v. State, 201 S. W. 986, decided by the Court of Criminal Appeals of Texas, in March, 1918, it was held that the tenure of office of a district judge, who had accepted an office in the military service of the United States, ceased by virtue of the provision of the constitution of that state declaring that no person holding or exercising any office of profit or trust under the United States shall be eligible to hold or exercise any office of profit or trust under the state, although there had been no appointment or election of a successor, and notwithstanding another provision of the constitution requiring all officers to perform the duties of their offices until their successors shall be duly qualified. And there is no reference in the opinion to the exception to the general rule aforesaid, nor does it appear to have been considered; the court holding that the provision rendering one holding an office of profit or trust under the United States ineligible to hold or exercise an office of profit or trust under the state was the controlling provision of the constitution. The case was before the court on appeal from a conviction of crime in a district court presided over by a special judge, it being contended that the election of the special judge was illegal, for the reason that the office of district judge had become vacant upon the entrance of the regular judge into the military service, and that the tenure of the special judge depended upon the continuance in office of the regular judge. It was, however, held in the case that the acts of the special judge were valid on the principle that he was a *de facto* officer.

In a more recent case in Kansas, involving similar facts, though the action was *quo warranto* to try the title of the special judge or judge pro tem., the court refused to declare vacant the office of the district judge, who had accepted an office in the military service of the United States, but held that the right of such judge to the office could not be challenged except by an appropriate action or proceeding instituted for that specific purpose; and that it could not be challenged in the proceeding then before the court against the judge pro tempore. The court said: "If Judge Rup-

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penthal has forfeited his right to the judgeship by his induction into the army, he certainly has not surrendered his judgeship. Whether a vacancy ought to be judicially declared, it cannot be declared except in some proceeding directed against Judge Ruppenthal." (State ex rel. v. Rea, 177 Pac. 528.) It appeared in that case that the district judge had not intended to surrender that office, but had continued in touch with the work of the court in his district, had signed various journal entries, and considered cases under advisement in which briefs were not submitted until after his arrival in Washington, where he entered the military service in the department of the Judge Advocate General. Preceding what is above quoted from the decision in that case, the court said that on September 16, 1918, the judge had not formally entered the army service and was still the lawful district judge, and being absent from a lawful session of the district court, it was proper that a judge pro tempore should be chosen to serve in his stead, and, further: "It will also be noted that whether the entrance of Judge Ruppenthal into federal service as a major in the United States Army disqualified him for the office of district judge, or whether it gives a cause of action to vacate his office, it has not caused an absolute and complete cessation of the exercise of his judicial powers; he still performs, in part, at least, the functions of a district judge. He has not resigned, and the governor has not appointed his successor, and his right to the office has not been questioned by the State of Kansas." (And see State ex rel. v. Cobb, 2 Kan. 32.)

The section of our constitution containing the provision prohibiting a person holding an office of trust or profit under the United States from holding at the same time an office or appointment under this state to which a salary, fees or perquisites are attached is identical with section 2 of article XII of the Constitution of Pennsylvania, and which was a part of the constitution of that state at the time the constitution of this state was adopted. While it cannot be said with certainty that the provision as found in our constitution was

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taken and adopted from the Pennsylvania constitution, the fact that it is an exact copy of the above mentioned section of the constitution of that state, and the same provision, in the same words, is not found in a constitution of any other state, although many of them contain a provision of the same general character, indicates quite strongly, and we think it very probable, that the provision aforesaid in our constitution was copied from the constitution of that state. In November, 1889, not quite two months after the convention which framed our constitution had adjourned, and a few days only after the constitution was adopted by vote of the people, but several months before it was in force upon the approval of the Act of Congress admitting Wyoming as a state, the Supreme Court of Pennsylvania had occasion to construe the section aforesaid of their constitution, though upon facts different from the facts in the case before us in this: That in the Pennsylvania case the state office had been accepted and its duties assumed by one who was at that time holding an office of profit under the United States, viz: The office of postmaster. And the proceeding was *quo warranto* questioning the right to hold the state office, it being alleged that the incumbent was disqualified from holding that office, by reason of the fact that he had held and was holding the office of postmaster. Prior to answer filed, the respondent resigned the office of postmaster and his successor was appointed, and these facts were alleged by the respondent in his answer. Judgment of ouster was refused on the ground that when the respondent appeared, in obedience to the mandate of the writ, he was not holding an office of trust or profit under the United States. But we refer to the case principally to show the construction of the provision by that court as to its effect in rendering an office held in violation of it immediately vacated or forfeited. The court said: "This case depends entirely upon the construction of the constitutional provision against the holding of incompatible offices, as it is not covered by any statute. The constitution makes these offices incompatible; but it does not prescribe a penalty, or declare a forfeiture. We are of the

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opinion that when issue was joined in this case the respondent had a valid title to the office of county commissioner, and that it was error to enter judgment of ouster." (De Turk v. Comm., 129 Pa. St. 151, 18 Atl. 757, 5 L. R. A. 853, 15 Am. St. Rep. 705.)

Thus, since the provision *"does not prescribe a penalty, or declare a forfeiture,"* it was held that, although when the respondent took the office under the state and for several months while holding that office, he was holding and exercising an office of profit under the United States, he could rightfully continue to hold the state office, having resigned the federal office before his appearance was required in an action challenging his title to the state office. And the fact is mentioned above that there is no provision of our constitution or statutes declaring the effect of the holding of incompatible offices generally, or of the holding at the same time of two offices prohibited as aforesaid by the constitution. But it was held by this court in State ex rel. v. Henderson, 4 Wyo. 535, 35 Pac. 317, 22 L. R. A. 751, that an office cannot be said to be vacant while any person is authorized to act in it, and does so act, and that a vacancy in an office exists only where there is no lawful incumbent occupying it.

We think there can be no doubt that under the several provisions of our constitution and statutes quoted above the common law rule requiring an acceptance of a resignation by proper authority before it can become effective so as to divest an incumbent of a public office has not been abrogated in this state, though it might not, perhaps, apply to an officer not required or authorized to exercise the duties of his office until a successor is duly qualified. Of course under that rule an acceptance may be manifested by the election or appointment of a successor by the officer, board or body authorized by law to fill a vacancy in the office. And the statute expressly provides, as shown above, that resignation of elective offices shall be made to the officer, court or county board authorized by law to fill a vacancy in such office by appointment or to order an election to fill such vacancy. The general provision of the constitution that

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every person holding any civil office, with certain stated exceptions not material here, shall, *unless removed according to law,* exercise the duties of such office until his successor is duly qualified, applies to the office of district judge, and the incumbent of that office by election is also expressly authorized to remain in office until his successor is duly qualified by the provision of section 19 of article V of the constitution prescribing the term for which each district judge shall be elected.

The relator, therefore, could not divest himself of his office of district judge by his own act, but it required the concurrence of the authority vested with the power to accept a resignation. If his act in accepting and assuming the duties of the federal military office would have permitted the office of judge to be treated as vacant and a successor to be appointed or elected, a question which need not be decided, no such action was taken, and the relator is rightfully exercising and discharging the duties of the office. And, in our opinion, he is not merely judge *de facto,* but is the *de jure* judge of the seventh district, and was such judge during the period for which the salary is claimed in this proceeding.

It is unnecessary, therefore, to consider the other points urged by counsel for relator suggesting that if the provision prohibiting the holding of a state and a federal office at the same time should be strictly construed the effect might be to discourage voluntary service in the army in time of war, and that it should be construed and applied so that it may not in any way interfere with the full exercise of the powers granted to Congress by the Constitution of the United States to declare war, raise armies, and make all laws necessarry and proper to carry such powes into execution.

It follows that the relator is entitled to the salary claimed, and that the writ prayed for must issue directing the auditor to issue the proper warrant upon the treasurer for the payment of such salary. It will be so ordered.

MENTZER, District Judge, concurs.

BEARD, C. J., and BLYDENBURGH, J., being ill, did not sit. HON. WILLIAM C. MENTZER, Judge of the First District,

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was called in to sit in place of BLYDENBURGH, J., and counsel consented to the submission of the case, without calling another district judge.

[APRIL TERM, 1919.]

CHAPMAN v. FIRST NATIONAL BANK.

(No. 920; Decided June 2nd, 1919; 181 Pac. 360.)

CONTINUANCE — ABSENCE OF WITNESS — FAILURE TO SUBPOENA — PROMISE OF WITNESS TO APPEAR—CONVERSION—OWNERSHIP OF NOTE—EVIDENCE—CONCLUSION OF FACT—BANKS AND BANKING—AUTHORITY OF CASHIER—NOTICE TO THIRD PERSON—ATTITUDE OF THIRD PERSON TO INQUIRY—COMMERCIAL PAPER—COLLECTIONS.

1. It was not error to refuse a continuance, under Comp. Stat., 1910, Sec. 5139, applied for on the ground of the absence of a witness residing in another state, where defendant had relied on his promise to attend and made no effort to secure his testimony by deposition or his attendance by legal process.
2. In an action by a partnership, the payee of a note, for its conversion, the mere fact that it had been indorsed to one of the partners was not sufficient to overcome testimony of such partner and the cashier of the partnership that the note belonged to the partnership at the time of the conversion, in view of Comp. Stat., 1910, Secs. 3349, 3188; there being no showing of delivery.
3. Testimony of a partner and a cashier of the partnership that a note indorsed to the testifying partner by the partnership belonged to the partnership was not a mere legal conclusion at variance with the note itself and the indorsement thereon, being a fact within the personal knowledge of the witnesses.
4. In an action by the owner of a note and mortgage against a national bank for conversion of a note and mortgage by its cashier, the owner having been induced to send the note and mortgage to the cashier by his letter indicating that they would be paid from the proceeds of a loan he was negotiating for the mortgagor, a statement in the letter

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by the cashier that "we are negotiating a real estate loan" for the mortgagor, did not necessarily imply that the bank was intending or expecting to make the loan direct, or with money under its control, so as to give notice to the owner that an illegal loan, that is, one prohibited by the National Banking Act, was contemplated, and thus charge him with knowledge of want of authority of the cashier to act for the bank in requesting him to send the papers to the bank.

5. The owner of a note and mortgage is not bound to inquire concerning the security to be taken by a national bank desiring to advance money to take up the note and mortgage and hence is not required to inquire concerning authority of the cashier to request sending of note and mortgage to the bank.
6. The acceptance of commercial paper for collection by a banking corporation is a well settled incident of the banking business, and a bank is liable in case it fails to perform its duty in making collection.
7. A cashier of a national bank has authority to accept for the bank notes and mortgages for collection.
8. The cashier of a bank is generally its chief executive officer and its general agent in the transaction of its legitimate business, and a bank is bound by his acts in the absence of notice to persons dealing with the bank of any restriction upon the authority of its cashier.

ON REHEARING

9. In a suit by partnership for the conversion of a note alleged to belong to the partnership, the existence of an indorsement by the partnership to an individual partner, without evidence of delivery to the indorsee, held not sufficient to disprove possession and ownership by the partnership as against direct evidence; Comp. Stat., 1910, Sec. 3174, not applying.

APPEAL from District Court, Park County; HON. E. C. RAYMOND, Judge.

Action by John W. Chapman, as surviving partner of the co-partnership of Meyer & Chapman, against First National Bank of Cody, et al. From a judgment for plaintiff, defendants appeal.

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Collins, Campbell & Wood and *J. H. Van Horn,* for appellants.

Plaintiff and respondent failed to prove that Meyer & Chapman were the owners of the note, which is an essential element of their case. (DeClark v. Bell, 10 Wyo. 1-7, 38 Cyc. 2044.) The note had been endorsed to John W. Chapman. He, Chapman, was the owner of the note within the provisions of the negotiable instrument law. (Sections 3188, 3192, and 3207, Comp. Stats.) The title and ownership was not in Meyer and Chapman at the time of the alleged conversion; defendant's motion for non-suit should have been granted; the most that could be claimed for the endorsement by Chapman was that it passed an equitable title, whereas a legal title was necessary to maintain the action. (Capitol Hill Bank v. National Bank of Rawlins, 160 Pac. 1171-1180.) There was no evidence that the note was in possession of Meyer & Chapman, when sent to Deegan at Cody. The testimony of Chapman that the note belonged to the copartnership was incompetent and a mere legal conclusion and a direct violation of the terms of the instrument upon which the action was brought. (Ward v. Shirley, 32 So. 489; Pichler v. Reese (N. Y.), 64 N. E. 441.) It was not shown that Deegan had authority to represent that defendant bank was negotiating a mortgage or to solicit the release of mortgage from Meyer & Chapman. National banks are prohibited by law from making loans on real estate. (U. S. R. S. 5136. Union National Bank v. Matthews, 98 U. S. 621, 25 L. Ed. 188; National Bank of Genesee v. Whitney, 103 U. S. 99, 26 L. Ed. 443.) One dealing with a corporation may rely upon an agent's authority to act upon matters within the apparent scope of his authority only, where the act is within the power of the corporation. It will never be presumed that an agent is authorized to do an illegal act. (Thompson on Corporations, 2nd Ed., Par. 1695 and 1532; Grow v. Cockrill, 63 Ark. 418, 36 L. R. A. 89; State Bank of Moore v. Forsyth, 41 Mont. 249, 108 Pac. 914; 28 L. R. A. N. S. 501; 31 Cyc. 1567 and 1568; 7 Ruling Case Law, Corporations, Par. 616; 3 Ruling Case Law, Bnks., Par.

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71; Fairchild v. Southport (Conn.), 67 Atl. 471; Grollman v. Ward, 181 Ill. App. 598; 10 Enc. of Evidence; Stover v. Flower (Ia.), 94 N. W. 1100; Strader's Adm. v. Manufacturing Co. (Ky.), 142 S. W. 1073; 31 Cyc. 1640; Condit v. Baldwin, 21 N. Y. 219; 78 Am. Dec. 137; Sturdevant v. Bank (Neb.), 87 N. W. 156 and 95 N. W. 819; North Star Boot & Shoe Co. v. Stebbins (S. D.), 48 N. W. 833; 5 Cyc. 475; Bank v. Armstrong, 152 U. S. 346, 38 Law Ed. 470.) Meyer & Chapman were charged with knowledge that Deegan had no authority to represent defendant bank in soliciting the release of mortgage referred to in his letter. The addition of the title "assistant cashier" to the name of W. J. Deegan had no effect other than to bind Deegan personally. (Metcalf v. Williams, 104 U. S. 93, 26 L. Ed. 665.) If Deegan acted in a representative capacity, it was as the agent of Park Loan & Trust Company. The District Court abused its discretion in denying a motion for a continuance.

W. L. Walls and *E. E. Enterline,* for plaintiff and respondent.

The ownership of the note is not denied by the answer, which must contain a general or specific denial of each material allegation of the petition controverted by defendant. (Section 4389 Comp. Stats. 1910; Section 4422 Comp Stats. 1910; 31 Cyc. 198.) After denying knowledge, it is superfluous to add a denial of facts. (Flood v. Reynolds, 13 How. Pr. 112.) No assignment of error attacking the sufficiency of the evidence to sustain the judgment is presented and the point is not reviewable. (Capitol Hill Bank v. Bank, 24 Wyo. 423.) Where parties join in an assignment of error in their petition, the judgment will be affirmed even though improperly entered against one. (Greenwalt, et al. v. Imp. Co., 16 Wyo. 226.) There was no evidence of delivery of the note to J. W. Chapman, nor of the endorsement to him by Meyer & Chapman. Evidence on the point was necessary to establish ownership by Chapman individually. Deegan, as assistant cashier, had authority to conduct the transaction for the bank. (3 R. C. L. 444.) A

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real estate loan made by a national bank can be enforced. (Hanover Bank v. National Bank, 104 Fed. 421.) Meyer & Chapman were induced to deliver the note and release the mortgage by representations made to them by Deegan, the authorized agent of the First National Bank of Cody, and the bank permitted it to be diverted and therefore became guilty of conversion. Its co-defendant having received the note of a joint tort-feasor and both must respond in damages for the value of the property converted. The motion for continuance was properly denied. That a witness failed to appear is not ground for continuance, since the party desiring his testimony should take his deposition. Especially so when the witness resides out of the State. (Keffer v. State, 12 Wyo. 49, 73 Pac. 556; Comp. Stats. 1910, 4547.) The judgment should be affirmed.

POTTER, JUSTICE.

This action was brought by John W. Chapman as surviving partner of the co-partnership of Meyer & Chapman against the First National Bank of Cody and the Park Loan & Trust Company for the recovery of damages for the alleged conversion of a certain promissory note and a release of a mortgage securing the same. There was a trial to the court without a jury, a general finding for the plaintiff and assessing his damages in the sum of $5,080.67, and a judgment in his favor for that amount and costs. The case is here on appeal.

1. As shown by the time of filing the pleadings which appear in the record, the case was at issue on January 16, 1916, and the trial was commenced on May 22, 1917. This was during the May term of the court. On May 21, 1917, the court overruled a motion of the defendants for a continuance to the next term, filed and presented on that day on the ground of the absence of a witness. That ruling is specified as error, and the question is whether the motion was improperly denied upon the showing made as to the diligence used to obtain the evidence. The statute provides that a motion to postpone a trial on account of the absence

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of evidence can be made only upon affidavit showing the materiality of the evidence and that due diligence has been used to obtain it, and if for an absent witness the probability of procuring his testimony within a reasonable time. (Comp. Stat. 1910, sec. 5139.)

The affidavit in support of the motion states that upon the 12th day of May, 1917, and immediately subsequent to the date when, by agreement of counsel, the cause was set down for trial on May 22, 1917, the affiant, one of defendants' attorneys, had a telephone conversation with W. J. Deegan, who resides at Roundup, Montaa, wherein said Deegan assured affiant that he would go to Cody, where the trial was to occur, not later than Monday morning, May 21, 1917, to testify in behalf of defendants on the trial of the cause on May 22, and that it would be wholly unnecessary to take his deposition, or to resort to any method to compel his attendance for said trial on that day. That said Deegan then also informed affiant that business matters were taking him to Idaho, but that he would return in ample time to be at Cody at the time set. That on the morning of May 20, 1917, affiant received a telegram from said Deegan, sent from Roundup and dated May 19, 1917, reading as follows: "Was called back from Butte because of case of pneumonia in family. Balance of party gone on and I will join them as soon as I can get away, so will absolutely impossible to keep my promise to you to go to Cody Tuesday." That affiant thereupon immediately endeavored to get into telephone communication with said Deegan, to persuade him to keep his promise to be present at the trial at the time set, but failed to reach him by reason of the fact that the telephone line was out of order, and that "although due and proper diligence was used by your deponent to obtain said W. J. Deegan as a witness for the trial, * * * nothing was accomplished by reason of the facts" aforesaid. That affiant believes that if a continuance for the term be granted the testimony of said Deegan can be procured either upon deposition or in person at the next term.

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We think that on this question the case is ruled against the appellants by the decision in Keffer v. State, 12 Wyo. 49, 73 Pac. 556. That was a criminal case, and the fact was stated in the opinion that our statute for postponing a trial on account of the absence of evidence applies alike to civil and criminal causes. It was held not to be error to refuse a continuance applied for on the ground of the absence of witnesses residing in another state, where the defendant had relied on their promise to attend, and made no effort to secure their testimony by deposition, nor to secure their attendance by legal process, other than by sending them subpoenas having no extra-territorial effect. It is true that in that case there had been one continuance on the ground that defendant had not had time to prepare for trial, and the second application was presented nearly six months afterwards, and that the record here does not disclose a previous continuance or motion therefor. But in this case a year and several months had elapsed after the case was at issue and before the application was made, with two terms of court intervening, if held as provided by law. And while the fact of one continuance was recited in the opinion in the Keffer case, the principle stated was not made dependent upon such fact. The court said: "The defendant chose to rely upon their promise to attend and he took the risk that they would be present." And supplementing this a statement was quoted from the opinion of Judge Brewer in a Kansas case to the effect that as a general rule when the attendance of a witness cannot be compelled a party relies upon his voluntary appearance at his peril. Then the following was quoted from the opinion in an Indiana case, as stating the rule supported by the great weight of authority:

"Where a party desires the testimony of a witness not within the jurisdiction of the court, he must take the deposition of the witness, for he cannot have compulsory process to compel attendance, and he has no right to have a continuance, upon the ground that the witness has promised to attend, and will attend at a future term."

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2. The note alleged to have been converted was a note of one Russell Kimball payable to Meyer & Chapman, secured by a duly executed mortgage upon certain land in Park county in this state, and dated at Red Lodge, Mont., February 5, 1906. It is alleged that the note was sent by the payees to the defendant bank, at its request, for collection, together with a duly executed release of the mortgage securing the same; and that the said note and mortgage at that time were owned and in the lawful possession of said Meyer & Chapman, a co-partnership engaged in the banking business at Red Lodge, Montana, where both of the partners, W. F. Meyer and John W. Chapman, resided. That said request for the note and release was made by the defendant bank on January 5, 1912, and thereupon the said co-partnership sent and delivered the note to the said bank, together with the release duly executed and acknowledged, with instructions to the defendant bank to surrender said note and deliver said release upon the payment of the sum due thereon.

The evidence shows that the request for said note and release was by letter dated at Cody January 5, 1912, written upon the letterhead of the defendant bank, addressed to "Meyer & Chapman, Bankers, Red Lodge, Mont.", signed "W. J. Deegan, Ass't Cashier", and reading following the address, so far as material here, as follows:

"My dear Alden:

"We are negotiating a real estate loan for the Kimballs here, and find that you have a mortgage on a portion of the ground in question. If agreeable to you, I will be pleased to have you execute the release of this mortgage, which I am herewith enclosing, and send the same, together with the notes secured, to the First National Bank here, with the understanding that the release is to be used when the money is turned over to you. I would also appreciate it if you would return this to us at the earliest possible date, as we might have use for it any day, or the matter might be delayed for some little time, but in any event, we would have it here when we were in a position to use it. The signature

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to this instrument must be witnessed by at least one person, and the acknowledgment should be taken before some other Notary than yourself, as under our laws you would be incapable of taking the acknowledgement of either Meyer or Chapman to an instrument affecting the bank, as you are an officer of the co-partnership. As soon as the deal is completed we will remit you the proceeds of your note to that date."

The "Alden" personally addressed in the letter was F. H. Alden, the cashier of the Meyer & Chapman Bank. Pursuant to that letter the said Alden, as cashier, transmitted an executed release of the mortgage by letter written on the letterhead of the banking house of Meyer & Chapman, dated Red Lodge, Mont., Jan. 11, 1912, and reading, so far as material, as follows:

"W. J. Deegan, Esq.,
"Cody, Wyo.
"Dear Bill:
"Replying to your favor of the 5th inst., I enclose herewith Release of the Kimball Mtg. as per your request. Our note, up to Jan. 15th., amounts to $3916.00 * * *.
"Yours truly,
"F. H. Alden, Cashier."

On January 13, 1912, by letter on the letterhead of said defendant bank, the receipt of said release was acknowledged as follows:

"Mr. F. H. Alden, Cashier,
"Red Lodge, Mont.
"My dear Alden:
"I am just in receipt of your letter of January 11th enclosing a release of mortgage duly executed and I shall be pleased to hold the same until the payment is ready, when I will return you the amount named and use the release.
"Very truly yours,
"W. J. Deegan
"Asst. Cashier."

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On April 15, 1912, the note was transmitted from the Banking House of Meyer & Chapman, by letter of that date, reading as follows:

"W. J. Deegan, Esq.
"Cody, Wyo.
"Dear Deegan:
"I enclose herewith the Kimball note amounting to $4028.59 to this date. Trusting you will be able to relieve us of this old sore in the near future I am

"Yours truly,
"J. W. Chapman
"Alden."

The receipt of the note was acknowledged by letter dated at Cody, April 19, 1912, and, like the others signed by Deegan, upon the stationery of the bank, reading as follows:

"F. H. Alden, Esq., Cashier,
"Meyer & Chapman Bank,
"Red Lodge, Mont.
"My dear Alden:
"I am in receipt of your letter of the 15th inst., enclosing Kimball note. There has been another trifling delay in regard to the title to some of this ground, which will be cleaned up within a few days, when we will remit you the amount in question. * * *

"Very truly yours,
"W. J. Deegan."

Although signing as assistant cashier all but one of the above letters bearing his signature, the evidence shows that Deegan became at least the acting cashier and the managing officer of the defendant bank in January, 1911, and it is conceded by the brief of appellants that "at the times mentioned in the petition", which includes the time of the correspondence aforesaid, "the evidence establishes" that said Deegan was cashier of the defendant bank and manager of the defendant loan and trust company.

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It appears that the release was filed for record in the office of the County Clerk of Park County, of which county Cody is the county seat, on April 9, 1912, the receiving book of that office showing that it was received for record from W. J. Deegan. Said release was signed: "Meyer & Chapman, a co-partnership, by W. F. Meyer, one of the co-partners", and acknowledged by said Meyer as the voluntary act and deed of himself and of Meyer & Chapman, and was dated January 10, 1912. Prior to the trial the plaintiff had not been able upon inquiry and search at the bank to find the note or obtain any satisfactory account of it, but upon the trial it was produced by an officer of the bank upon a subpoena *duces tecum* who, as the testimony shows, had found it in a drawer of a desk which had been used by Mr. Deegan during his connection with the bank, and at the time in question in 1912 was in a room of the bank occupied by him and formerly by the cashier who immediately preceded him as the cashier and managing officer of the bank.

When the note was produced at the trial it had upon its back the following endorsement: "Pay John Chapman or Order, sans recourse Meyer & Chapman by F. H. Alden." Upon the fact of that endorsement it is contended by the appellants that the partnership was shown thereby not to have been in possession of the note when it was transmitted for collection, but that it was the individual property of Chapman, and that, therefore, the plaintiff cannot recover in this action brought by him as surviving partner. There is no testimony directly explaining the endorsement. F. H. Alden, the cashier of the Meyer & Chapman Bank when the note left that bank, and the one who transmitted it, was asked as a witness by plaintiff's counsel if he could state how the endorsement got on the paper, but the question was withdrawn upon its being objected to, although the objection was overruled. That witness, however, testified that when he transmitted the note it was one of the bills receivable belonging to and in the possession of Meyer & Chapman. And Mr. Chapman testified that until the death of

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his partner, Meyer, the note and mortgage belonged to the partnership, and that it constituted part of the partnership assets at the time of Meyer's death, for which he, the plaintiff, was bound to account as surviving partner. It is admitted by the pleadings that pursuant to the law of Montana and an order of the proper court in that state said Chapman had given bond as surviving partner to close up and settle the partnership business.

Upon this evidence it cannot be held that when the note was transmitted for collection it was the individual property of Chapman or in his possession independent of the partnership of Meyer & Chapman. If it might be inferred from the indorsement that at some time before sending the note to Cody there had been a transfer of the possession or ownership thereof to Chapman individually, the inference from the evidence would be equally strong that the partnership had again acquired the possession and become the holder thereof, and the indorsement might have been stricken out under the provision of the statute authorizing the holder of a negotiable instrument to strike out any indorsement not necessary to his title. (Comp. Stat. 1910, sec. 3206.) But the mere fact of the indorsement, the original payees having possession of the instrument, would not show either title or possession in the indorsee, for there is nothing in the case to show that the indorsement was completed by delivery.

The negotiable instruments law provides that an instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof; if payable to bearer it is negotiated by delivery; if payable to order, it is negotiated by the indorsement of the holder, completed by delivery. (Comp. Stat. 1910, sec. 3188.) And in defining the meaning of words used in the law it is further provided that "Indorsement" means an indorsement completed by delivery, and "Holder" means the payee or indorsee of a bill or note, who is in possession of it, or the bearer thereof. (Id. sec. 3349.) The note in question was payable to order.

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The testimony of Alden and Chapman as to the fact that the note was in the possession of, and one of the bills receivable belonging to the partnership is not to be regarded as stating a mere legal conclusion at variance with the note itself and the indorsement thereon, nor as an opinion or conclusion upon facts appearing in the case, but rather as stating a fact within the personal knowledge of the witness. (Pichler v. Reese, 171 N. Y. 577, 64 N. E. 441; Olson v. O'Connor, 9 N. D. 504, 84 N. W. 359, 81 Am. St. Rep. 595.) Chapman's testimony on the subject was not objected to, and although objections were interposed to the statement by Alden of the fact of possession and ownership, and overruled, and the court's ruling thereon was specified as error, the point as to the admissibility of the testimony is not discussed in the brief of appellants. But such testimony seems to come within the principle stated in Pichler v. Reese, supra, that witnesses may testify to facts, which are within their own knowledge, even though the facts are such as the jury is eventually to determine, there being a distinction between asking a witness to testify to a fact, the existence of which depends upon a collection of facts, or upon the construction of a written instrument, and asking him to testify to a fact, which is, necessarily, within his own knowledge.

3. The further contentions of counsel for appellants relate to the sufficiency of the evidence to sustain the judgment as against the defendant bank. The additional facts to be considered in disposing of these contentions, including testimony uncontradicted unless by the correspondence aforesaid or other documentary evidence, may be stated as follows: The directors and stockholders of the two defendant corporations of which Deegan was the managing officer as aforesaid, were practically the same, and their business was transacted in the same building and rooms, and at least one other of the employees was in the employ of both institutions. In the front or main room were two windows—so-called in the testimony—supposedly in the framework or fixtures separating the private from the public part

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of the room, one being used generally by the bank and the other by the trust company, and the vault and working space were used in common by the two institutions. Back of that was a private room used by Mr. Deegan, and in the rear of that a room described in the testimony as the abstract room of the defendant loan and trust company. The desk in which the note in question and certain other papers to be mentioned were found was, in 1912, in the private room used by Deegan. In that room Deegan transacted general banking business and also the business of the loan and trust company. The note was found with other papers in an envelope upon which was written, when found: "Kimball & Kimball," and underneath that, "Russell Kimball to Meyer & Chapman." Among the other papers was a bill or account of the Cody Trading Co. for $1498.96 against Kimball Brothers, including a note to that company for $880.31, signed by Farley Kimball and Russell Kimball, attached to the bill, a note of the same parties to E. E. Lonabaugh for a small amount, three notes to the Park Loan & Trust Co., signed by Russell Kimball and James P. Kimball, one for $500.00 and the other two for $475.00 each, one note for $785.00 to the same company, signed by Russell Kimball, and two slips of paper containing figures—one of them being evidently a computation of interest and the amount due on the Meyer & Chapman note on April 15, 1912, and the other, without date, a computation of the total amount due upon the several obligations aforesaid, including $4028.59, the computed amount due on the Meyer & Chapman note, showing a total of $7,719.60, and underneath that, but without adding them, the figures 188 indicating that amount in dollars.

It further appears that on January 17, 1912, a mortgage release was filed for record releasing a mortgage of James P. Kimball to the defendant trust company, executed January 1, 1911, which release was delivered for filing by said W. J. Deegan. That on January 15, 1912, a mortgage was filed for record, which purported to have been executed on January 8, 1912, and acknowledged on the 13th of that

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month, by James P. Russell, Ina M. Farley, and Mina Kimball to the said Park Loan & Trust Company, covering with other lands the lands included in the Meyer & Chapman mortgage as described in the release of that mortgage. The Meyer & Chapman mortgage was the only lien on the land covered thereby until the last above mentioned mortgage to the trust company was executed and delivered. On January 19, 1912, the amount of $7,000.00 was deposited or placed to the credit of Kimball & Kimball in the Park Loan & Trust Co. The amount due the Cody Trading Co. was placed to its credit in the defendant bank on April 23, 1912, the release of the mortgage to that company having been previously delivered to the bank, at its request.

Russell Kimball testified that Deegan had informed him that the trust company desired a readjustment of the business of the Kimballs, so as to secure all their obligations by one mortgage, pursuant to which the mortgage for $7000 was executed in January, 1912, and that by the agreement the Meyer & Chapman mortgage was to be taken care of by the trust company, as well as all the other notes above mentioned found in the envelope aforesaid with the Meyer & Chapman note, except the one to Lonabaugh which, Mr. Kimball stated, he did not know had been sold to the trust company and its inclusion in the new mortgage was a surprise to him; and the Meyer & Chapman mortgage was to be cancelled by the execution of the new mortgage. He also testified that the transaction was not with Deegan individually but with the trust company; that neither the Meyer & Chapman note nor the release of the mortgage securing it had been delivered or surrendered to him or his brother by either of the defendants, although he had demanded them several times of Deegan as an officer of the trust company and his assistants.

Mr. Alden testified that he had been acquainted with Mr. Deegan for 16 or 17 years, and before the time of the latter's residence at Cody, and that at one time they had worked together in the Meyer & Chapman bank at Red Lodge, Montana; that the Meyer & Chapman bank had no personal dealings with Deegan after he became connected with the

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defendant bank, but when he was acting as cashier of that bank any transaction of the former bank with the latter would go through Deegan as cashier; that the note and release in question were sent to the bank, although the letter transmitting them may have been addressed to Deegan, and that all the financial transactions and correspondence between the two banks had been conducted in that way.

Plaintiff's first inquiries at the bank concerning the disposition of the note and release were made while Deegan remained with the bank as cashier, and his explanation was that the papers had become misplaced in some way, and later he made the same statement to plaintiff's attorney, who called at the bank to ascertain what had become of the papers, and invited and assisted in a search for them in the bank vault; all of which occurred after the recording of the release, but before the plaintiff or his attorney had ascertained that it had been recorded.

The specific contentions upon all the evidence are: That to establish a liability against the bank it was necessary to show "ostensible authority" in Deegan as its agent to make the representations in his letter of January 12, 1912, respecting a real estate loan to the Kimballs, and that the evidence fails to show such authority. That the bank being prohibited by the National Banking law from making loans on real estate, Meyer & Chapman were charged with knowledge that its agent was without authority to solicit the mortgage release for the purpose of consummating a real estate loan. That Deegan's letters signed either "Assistant Cashier" or without official description had no effect except to bind him personally, and finally, that if he acted at all in a representative capacity his representations were made as the agent of the trust company, and not as agent of the bank.

The right to recover against the bank does not depend upon the statement or representation with reference to the negotiation of a real estate loan for the debtor, but upon the fact of its receiving and accepting the note for collection together with the release, and wrongfully disposing of

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the same. What was said with reference to a real estate loan in the letter requesting that the note and release be sent to the bank was evidently to explain the probability or expectation of payment through negotiations then pending, and it is immaterial whether the bank was or was not a party to such negotiations, or whether its cashier was authorized in his capacity as such officer to negotiate the loan or to represent that it was being negotiated by the bank. But the statement in the letter that "we are negotiating a real esate loan for the Kimballs here" does not necessarily mean or imply that the bank was intending or expecting to make the loan direct or with money under its control, and therefore was not notice to Meyer & Chapman that an illegal loan was contemplated, charging them with knowledge of want of authority in the cashier to act for the bank in requesting the sending of the papers to the bank. Nor would the situation be affected by any intention of the bank to make a real estate loan. The owner of the note and mortgage would not be bound to inquire concerning the security to be taken by the bank if it advanced the money.

The acceptance of commercial paper for collection by banking corporations "is a well-settled incident of the banking business, and they will be liable in case they fail to perform their duties in making the collection." (3 R. C. L. 424; 7 C. J. 597, 619-620; and see Porter v. Packers Nat. Bank, 95 Neb. 223, 145 N. W. 255; Knapp v. Saunders, 15 S. D. 464, 90 N. W. 137.) And the cashier clearly had authority to accept for the bank the papers in question here, and his letter requesting that they be sent to the bank serves with the other correspondence to show the conditions or understanding upon which the bank received them. The cashier of a bank is generally its chief executive officer, and its general agent in the transaction of its legitimate business. (1 Morse on Banks & Banking (5th ed.), sec. 152; 3 R. C. L. 444; First Nat. Bank v. Seass, 158 Ill. App. 122.) He has charge of the bank's correspondence, "and letters on corporate business are properly addressed to him, and whatever statements or information are contained in them will,

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in law, affect the bank with notice." (1 Morse on Banks & Banking (5th ed.), sec. 162.) "Those acts which constitute the ordinary and customary functions of cashiers, and which he has inherent power to do, bind the bank as its own acts in favor of any person dealing with the bank and having no notice of any restriction upon the cashier." (Id. sec. 171.)

The conclusion cannot be avoided that the note and release were sent to and received by the bank. Deegan's request, over his signature as assistant cashier, was that they be sent to the bank, and the letter enclosing the release stated that it was in reply to his letter and that the release was enclosed "as per" that request. The failure to send the note at the same time is not explained in the evidence, but Alden testified as his recollection that it was enclosed with the letter of April 15, 1912, signed "J. W. Chapman—Alden", upon Chapman receiving a communication by telephone, who then dictated the letter. As stated above, the reply to that letter was written upon a letterhead of the bank, and stated the expectation that the amount due would be remitted within a few days. It is probably true that in negotiating or making the loan to take up the several Kimball obligations, Deegan was acting for the trust company, but we regard the evidence as clearly showing that he assumed to represent the bank in requesting and receiving the papers from Meyer & Chapman, and that the latter understood, as they had a right to do, that he was representing the bank in that matter. The trust company was not mentioned in any of the correspondence, and the evidence shows that Meyer & Chapman had no dealings with that company.

Another action brought in the United States District Court for Wyoming by the Meyer & Chapman State Bank was one brought against the defendant bank as for money loaned, and involved correspondence on the part of the bank signed by Deegan as its cashier, written on letterheads of the bank, and also a telephone communication between Deegan and Chapman. At the conclusion of the evidence in that case the trial court announced that the plaintiff had not established its case, and that, taking it altogether, it

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showed that there was no guarantee by the bank, but the remedy, if any, was against Deegan, and judgment was rendered for the defendant. The cause was taken on error to the Circuit Court of Appeals for the Eighth Circuit, where the judgment was reversed, and the court said: "The evidence clearly shows that he (Deegan) represented the paper as a part of the assets of defendant's bank, and that he offered is as collateral for a loan to his bank. Defendant cannot escape the repayment of money, which it received and used, upon a showing that the note which it offered as collateral to the loan in fact did not belong to it. Whether that was so or not, the loan was certainly made to it." (Meyer & Chapman State Bank v. First Nat. Bank of Cody, 248 Fed. 679, 160 C. C. A. 579.)

We conclude that the judgment must be affirmed, and it will be so ordered. *Affirmed.*

BEARD, C. J., concurs.

BLYDENBURGH, J., being ill, did not participate in the decision.

ON PETITION FOR REHEARING.

PER CURIAM.

The appellants have filed a petition for rehearing. The only point made in support of the petition was considered by the court in disposing of the case upon the former hearing. It is again contended that the evidence shows that the note alleged to have been converted was in the possession of the plaintiff Chapman individually at the time the note was transmitted to the defendant bank, leaving him without any right to recover in the action as surviving partner of Meyer & Chapman. But we see no reason for doubting the correctness of the court's conclusion upon that matter. The basis of the contention is the fact that the note, as produced in evidence, shows an endorsement by Meyer & Chapman to John W. Chapman, and that the letter transmitting the note was signed in the name of J. W. Chapman; and it is stated in the brief in support of the petition for rehearing that said letter was not from the banking house of Meyer & Chapman, but that the sender of the letter and note was J. W.

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Chapman, showing thereby that he was then, individually, in possession of the note. That letter, however, was written upon the stationery of the Meyer & Chapman bank. Its heading is "Banking House of Meyer & Chapman", and it was signed "J. W. Chapman" with the name "Alden" underneath, showing that the signature was written by Mr. Alden, who was the cashier of the bank, and Mr. Alden testified with reference to it: First, that it was the letter which he wrote transmitting the Kimball note, and, again, that the request for the note—it not having been sent with the release of the mortgage—was by telephone, and that he "evidently wrote the letter as dictated by Mr. Chapman". And the fact that Mr. Chapman dictated the letter or that his name was signed to it individually is not inconsistent with the fact testified to by both Alden and Chapman that the note was then in the possession of and belonged to Meyer & Chapman, or the fact testified to by Alden that the note at that time was one of the bills receivable of the Meyer & Chapman bank. As against the testimony distinctly stating the fact that Meyer & Chapman owned and were in possession of the note at the time it was transmitted to the defendant bank the fact of the endorsement aforesaid without any evidence of a delivery to the endorsee is not sufficient to disprove the fact of possession by the partnership or to show that the note was in the possession of Chapman individually. Nor does the fact that the letter was dictated by Chapman and signed in his name show that the note had been delivered to Chapman so as to complete the endorsement, in view of the testimony that when it was transmitted it was in the possession of the partnership, and the absence of any testimony showing that it had at any time been out of their possession until it was sent to the defendant bank.

The note with the endorsement was introduced in evidence by the defendants, the appellants here, and their counsel inquired specifically of Chapman as to the possession of the note after it was sent to Cody, and the opportunity was open to appellants to inquire as to whether there had been any change of possession before the note was sent to Cody,

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or at or after the time of the endorsement, or in connection with it. But they seem to have carefully avoided any inquiry as to that matter, and neither Alden nor Chapman were cross-examined as to the fact brought out in their testimony that in January, 1912, and up to the time that the note was sent to the defendant bank Meyer & Chapman were in possession of the note and that it was a part of the property of that partnership. And when the plaintiff sought, by a question referred to in the former opinion, to have the cashier, Alden, explain the fact of the endorsement upon the note an objection thereto was interposed by the defendants, leading to a withdrawal of the question, notwithstanding that the objection was overruled, and the substitution of other questions bringing out the testimony of the witness that the note was one of the bills receivable and in the possession of Meyer & Chapman in January, 1912, and also in April, when it was transmitted.

The fact that the note was in the possession of Meyer & Chapman being shown by positive and undisputed testimony there is no room for the presumption of delivery by an endorser who is not in possession, under section 3174, Compiled Statutes, 1910, providing that where the instrument is no longer in possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is shown. Nor is the testimony of Alden and Chapman with respect to the fact of possession at all analogous to the testimony which was held to amount to a mere legal conclusion if comprehending what was contended in Capitol Hill State Bank v. Rawlins National Bank, 24 Wyo. 423, 160 Pac. 1171, cited and relied upon by the appellants. In that case an officer of the plaintiff bank, which was suing upon a note made to another party and alleged to have been endorsed to it, testified that the note was "negotiated with the plaintiff bank". The endorsement, which was denied, was not proved unless by that testimony, for it was not introduced nor received in evidence; but it was contended that the testimony that the note was negotiated with the bank proved the fact that it had been

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endorsed and delivered to the bank by the payee, on the ground that the word "negotiated" includes endorsement as well as delivery of an instrument payable to order. We said that so far as the use of that word in the question propounded to and answered in the affirmative by the witness may have implied a legally proper and completed transfer, it involved a mere legal conclusion, and without any showing of the facts of the transaction, except as it might tend to show a transfer to the plaintiff by someone not necessarily the payee. And in the former opinion in this case, in holding that the testimony of Alden and Chapman as to the fact of the possession of the note by the partnership was not to be regarded as stating a mere legal conclusion we referred to the distinction between asking a witness to testify to a fact, the existence of which depends upon a collection of facts, or upon the construction of a written instrument, and asking him to testify to a fact, which is, necessarily, within his own knowledge, and the rule because of that distinction that witnesses may testify to facts which are within their own knowledge, even though the facts are such as the court or jury is eventually to determine.

We are not convinced that there should be a rehearing for a reconsideration of the question as to whether the note when it was transmitted to the defendant bank was in the possession of Chapman rather than Meyer & Chapman, and no other reasonable ground is perceived for granting a rehearing. It will, therefore, be denied.

Rehearing denied.

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HUNT v. CITY OF LARAMIE.

(No. 962; Decided June 2nd, 1919; 181 Pac. 137.)

APPEAL AND ERROR—NECESSARY PARTIES—WATER APPROPRIATIONS—PROCEEDINGS—"AGGRIEVED PARTY"—PLEADINGS—WAIVER OF VERIFICATION—IMPLIED FINDINGS—JUDICIAL DISCRETION—TRIAL—REBUTTAL—BOND ON APPEAL BY CITY—REVIEWABLE FINDINGS—PERCOLATING WATERS—PUBLIC WATERS.

1. There is no Statute requiring that the State Board of Control be made a party to proceedings on appeal, from its decision to the District Court, notwithstanding that Comp. Stat., 1910, Section 733, provides that the Attorney General shall represent the Board of Control in such cases.
2. The city which appeared before the State Board of Control and contested an application to appropriate waters claimed by the city, was an "aggrieved party" upon the appropriation being granted and could appeal to the District Court under the provisions of Comp. Stat., 1910, Section 733.
3. A motion to make a petition more definite and certain operates as a waiver of a lack of verification and an order of court permitting the movant to withdraw his motion does not operate or relieve him of the consequences of the waiver.
4. On the presentation of a motion to strike a petition on the ground that it lacked verification, there were affidavits offered which raised a question of fact as to whether the petition had not really been sworn to, and though the record fails to disclose how the question of fact was determined, it will be assumed as consonant with the action of the trial court in overruling the motion that there was a finding that the petition had been verified.
5. The admission of evidence in rebuttal over objection that it should have been offered in chief, being within the sound discretion of the trial court, will not be disturbed on appeal, in the absence of a showing of surprise or prejudice to the adverse party.
6. A bond given on appeal by a city from an order of the State Board of Control involving water rights, duly executed by the Mayor and Clerk on behalf of the city, was not vitiated by a failure to write the name of the city at the end of the bond, the body of the bond and attestation clause clearly showing the instrument to be an obligation of the city.
7. It is a uniform rule that an appellate court will not disturb a finding of fact made by a trial court when there is evidence upon which the finding may be reasonably based.

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8. **Percolating waters developed artificially by excavations and other artificial means belong to the owner of the land upon which they are developed, and cannot be appropriated as waters of the State under Const., Art. VIII, Sections I and II.**

ERROR to District Court, Albany County; HON. W. C. MENTZER, Judge.

James Hunt, as executor of the last will and testament of Alice Hunt, deceased, applied to the State Engineer for a permit to divert and appropriate waters. The application was rejected and, on appeal to the State Board of Control, the ruling of the State Engineer was reversed, and the City of Laramie, claiming ownership of the waters applied for, appealed to the District Court, where a judgment was rendered in its favor; petitioner and the Board of Control bring error.

S. C. Downey and *W. L. Walls,* attorney general, for plaintiff in error.

The City of Laramie was not an aggrieved party within the meaning of Section 733, Comp. Stats. 1910, or Section 779, Comp. Stats. 1910. (Dailey v. Anderson, 7 Wyo. 1, 48 Pac. 839; McFarland v. Pierce, 45 N. E. 706; Phillips v. Levy, 3 N. Y. S. 664; Kineally v. Macklain, 67 Mo. 95; State ex rel. Kineally v. Boyd, 6 Mo. App. 57-58; Street v. Bradstreet, 33 Mass. 264; Tellinghaust v. Brown Univ. 52 Atl. 891-892; Ross v. Wigg, 3 N. E. 180-181.) The appeal bond was insufficient, not being signed by the city. (28 Cyc. 140.) The court erred in admitting the contract in evidence on rebuttal. The contract was not established as an existing and valid contract between the city and its grantor. A contract between parties rendered void by non-performance cannot adversely affect the interests of third parties, or establish the right of a third party to appeal from a ruling of the Board of Control. The petition on appeal was unverified. Verification is required. (Section 4422 Comp. Stats. 1910. Conn v. Rhodes, 26 O. S. 644; Hanover v. Sperry, 35 O. S. 245; Bingham v. Hill, 38 O. S. 657;

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State v. Sullivan, 15 C. C. 477.) A pleading without verification where such is required has no standing. (Waites Prac., Vol. 11, p. 243; 22 Enc. P. P. 1040.) The motion to strike should have been sustained. (Warner v. Warner, 11 Kans. 100.) The Board of Control is a necessary party on appeal from its decisions, and this is especially true if the real party in interest should refuse to follow the appeal. Moreover, the attorney general is required to appear on behalf of the Board of Control in such cases. (Sections 733, 780, 781 and 783, Comp. Stats. 1910.) A party failing to offer evidence but appearing merely to cross-examine witnesses of the adverse party acquires no appealable interest. The city's grantor had submitted himself to the jurisdiction of the State water officers in seeking an appropriation of the water in question, and is for that reason estopped from denying the jurisdiction of State water officers in the premises. The State having acquired jurisdiction, retained it. (Const., Art. II, Sec. 31; Art. VIII, Sec. 1.)

Cortherr, McCollough & Corthell, for defendant in error.

The water in question is an artificial supply of a private as distinguished from a public character, and the Board of Control has no jurisdiction to permit its appropriation and no rights were acquired by Hunt under his permit. State waters are defined by the Const., Art. VIII, Sec. 1. The supervision of the Board of Control is limited to waters of the State. (Const., Id. Art. VIII, Sec. 2.) A water right is a right to use waters of the State. Section 724, Comp. Stats. 1910, appropriations of which are initiated by application to the State Engineer for permit. The law of natural water courses does not apply to waters artificially developed. (Wiel, 52 and 53.) The question of jurisdiction persisted throughout the proceedings and was fundamental at all stages thereof. The question was determined by the Ditrict Court in favor of defendant in error and against plaintiffs in error upon the evidence. If there was evidence to sustain this finding, it will not be disturbed on appeal. (Ketchum v. Davis, 3 Wyo. 164, 167; Columbia C. M. Co. v. Dutchess M. M. & Co., 13 Wyo. 244, 256; Slothower v. Hunter, 15

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Wyo. 189, 204; Riordan v. Horton, 16 Wyo. 363, 374; Yount v. Strickland, 17 Wyo. 526, 534; City of Rawlins v. Murphy, 19 Wyo. 238, 252; Saratoga Land & Inv. Co. v. Jensen, 20 Wyo. 323; Stockgrowers Bank v. Gray, 24 Wyo. 18, 40.) There is abundant evidence to sustain the findings of the trial court. The appeal was executed by the City of Laramie, as principal, and by A. C. Jones, as surety. The body of the bond and attestation clause show it to be an obligation of the city. It was executed by the mayor and clerk under the seal of the city. The omission of the name of the city at the end of the instrument is immaterial. The point urged as to the verification of the original petition is without merit. An amended petition was subsequently filed upon which the case proceeded and there was no question as to its verification. The fact that Pope applied to the State for a permit could not confer jurisdiction where jurisdiction did not exist. Jurisdiction cannot be conferred by consent. (11 Cyc. 673.) The private character of the waters was established by evidence of physical facts and conditions; the doctrine of estoppel does not apply. The case lacks all the elements of estoppel. (Gustin v. Harting, 20 Wyo. 1.) Hunt, by sharp practice, sought to appropriate the benefits of labor and expenditures by the city and its grantor, Pope. The city has prosecuted its claim with diligence. The judgment should be affirmed.

BURGESS, DISTRICT JUDGE.

On June 5, 1913, James Hunt, as executor of the last will and testament of Alice Hunt, deceased, caused to be filed in the office of the State Engineer of the State of Wyoming an application for a permit to divert and appropriate, through the means of a ditch, for irrigation and stock purposes, the waters of a certain spring situated in Albany County, Wyoming, and known as "Pope Spring". On June 30, 1914, the State Engineer rejected the application and endorsed thereon as the reason therefor, "Owing to insufficient water supply, the proposed ditch is not feasible." From this action of the State Engineer Hunt appealed to the State Board of Control

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of the State of Wyoming, which, on January 19, 1915, entered an order sustaining the action of the State Engineer in rejecting the application, for the reason, as stated in the order, "That the source of supply is underground and artificially developed." A rehearing of the matter having been granted by the Board, the proceedings finally resulted in an order and determination, November 17, 1915, setting aside its order dated January 19, 1915, reversing the action of the State Engineer, and requiring that the application be granted. In this final order the Board found that the waters of Pope Spring were subject to appropriation. In the proceedings before the Board resulting in the order and determination of November 17, 1915, the City of Laramie appeared and participated therein.

On December 10, 1915, the City of Laramie filed in the District Court of Albany County, Wyoming, its notice of appeal and appeal bond, and on December 17, 1915, its notice of perfecting appeal. On May 11, 1916, it filed in said court its petition on appeal, which was superseded by an amended petition filed March 29, 1917. In its amended petition the City of Laramie alleged, among other things, that the waters of Pope Spring, which were sought to be appropriated under the application of Hunt, were not the waters of any natural stream, spring, lake or other collection of still water, but were waters wholly discovered and developed artificially by excavation and other artificial means by one Pope, who was the owner of the lands upon which the spring in question was and is situated, and that the waters of said spring were the absolute property of said Pope; that by an agreement in writing dated February 14, 1915, between it and Pope and others, whom he had associated with him in the ownership and control of these waters, the city acquired the right to purchase said waters and to enter into the possession thereof, and, further, to explore and develop the same, and that it became obligatory upon the city to make such purchase upon the conditions set forth in the agreement; that thereafter it had entered into the possession of said waters and was using the same; that

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Hunt, assuming to act under and by virtue of the authority of the permit of appropriation approved by the Board of Control, had gone upon the land upon which said spring was situated and constructed ditches and other conduits and waterways, and had seized and led away the waters of said spring.

An answer was filed admitting many of the allegations of the petition, but denying, among other things, that the waters of the spring were developed artificially or that the waters were the property of the said Pope.

The cause having come on for trial, the District Court rendered judgment on November 27, 1917, and found generally in favor of the City of Laramie.

Hunt, as executor, and the Board of Control having filed motions for new trial, which were overruled, have brought the case here by proceedings in error.

The plaintiffs in error, in seeking a reversal of the judgment, contend:

First: That the Board of Control was a necessary party to the appeal taken by the City of Laramie in this case to the district Court from the order of the Board of Control granting the application of Hunt, and that it was not made a party.

There is no statute requiring in appeals of this nature from the State Board of Control to the District Court that the Board be made a party. Section 733 of the Wyoming 1910 Compiled Statutes, provides, last sentence, that "The Attorney General shall in such cases (that is, appeals of this character) represent the State Board of Control." The Board of Control, however, voluntarily appeared in this proceeding in the District Court, and was represented by the Attorney General, acting through a special assistant. It filed in the District Court a motion to dismiss the appeal of the city; it participated in the trial, filed a motion for new trial, and joined in the petition in error in this case. Its appearance was, in legal effect, a general appearance, and it was, in fact, a party to the proceeding in the District Court.

Second: That the City of Laramie was not an aggrieved

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party as contemplated by Section 733 of the Wyoming 1910 Compiled Statutes, which provides that "Any person or persons feeling himself or themselves aggrieved by any order or determination of the Board of Control * * * may * * * take an appeal to the District Court. * * * ."

The city had appeared before the Board of Control and contested the right of Hunt to the allowance of his application. It was the contention of the city that the waters of Pope spring were not subject to appropriation, but that they were artificially developed waters, and had become the absolute property of Barton D. Pope, who, with others, by contract, had vested the city with the right to acquire by purchase these waters, together with land upon which the spring was located, and to enter into possession of the same. In pursuance of its rights under this contract, the city had taken possession of the Pope Spring, and was using the water at the time the order of the board appealed from was made. The city, therefore, had an interest in the subject of the controversy, and was adversely affected by the order of the board appealed from. Says Corpus Juris, Vol. 3, p. 625, "As a rule, an appealable interest in the subject matter exists whenever the interest of the party may be enlarged or diminished, or his rights or liabilities affected, by the result of the appeal." See also definitions of "aggrieved party" in Words and Phrases, Vol. 1, p. 273.

Third: That the district court should have sustained the motion of Hunt to strike the original petition of the city because it was not verified.

The affidavit verifying the original petition was in proper form and was signed by one of the attorneys for the city, but it did not appear therefrom that the affidavit was sworn to, there being absent from the *jurat* the name and seal of the officer.

To this petition Hunt first filed a motion to make it more definite and certain. The filing of this motion operated as a waiver of the lack of verification, if any. (Hershiser v. Delone, 38 N. W. 863.) It is true Hunt made an applica-

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tion later to withdraw his said motion, which application was granted by the court, and thereupon he moved to strike the petition because it was not verified, which was denied. The order of the District Court, however, in permitting Hunt to withdraw his motion to make more definite and certain did not operate to relieve him of the consequences of the waiver he had already made by filing his first motion. His motion to strike the petition was, therefore, too late.

Moreover, the presentation of the motion to strike was accompanied by affidavits which raised a question of fact as to whether the petition had not really been sworn to, and, though the record fails to disclose what determination was made of this question of fact, yet it may well be assumed, as consonant with the action of the trial court in overruling the motion, that the ground therefor was a finding that the petition was in fact verified.

An amended petition was subsequently filed, which was duly verified beyond question, and it was upon this amended petition that the case was tried.

Fourth: That the District Court erred in admitting in evidence in rebuttal over the objection of Hunt the contract between Pope and his associates and the City of Laramie.

It is perhaps true that the contract in question properly belonged to the case of the city in chief, and should have been offered in its case in chief. However, in such matters a trial court is vested with a sound discretion, and an appellate court will not interfere unless there has been a manifest abuse of that discretion. An examination of the record fails to disclose that the admission of the contract in rebuttal took the appellants by surprise, or deprived them of an opportunity of meeting it, or prejudiced them in any way.

Fifth: That the bond filed by the city in the District Court on its appeal from the State Board was insufficient as an appeal bond, in that it was not signed by the City of Laramie.

In the body of the bond the City of Laramie is named as the contracting party, or the party assuming the obligations

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imposed therein, and the attestation clause of the bond recites, "In Witness Whereof, the City of Laramie has caused these presents to be executed by its Mayor, attested by its Clerk, and sealed with its corporate seal this 10th day of December, 1915."

The bond is then signed by the Mayor as such and attested by the City Clerk as such, and the seal of the city affixed. It is also signed by the surety. In executing a bond of this character, the city could act only through its proper officers, which were the Mayor and the Clerk. It was executed for and on behalf of the city by them. It was plain on the face of the instrument that the city was incurring the obligation, and, as executed, the failure to write the words "The City of Laramie" at the end of the bond would not vitiate it. (See Gottfried v. Miller, 14 Otto, 521; 26 Law Ed. 851.)

Sixth: That the judgment of the District Court is contrary to the evidence.

The vital question in the case was a question of fact as to whether Pope Spring was a natural spring or a spring artificially developed by means of excavations by Pope, upon whose land it was situated. From the evidence, it appears the spring was developed by digging into a subsurface stratum or formation through which and from which the waters percolated and found their way out to the surface at the point where the excavation was made. The contention of the appellants in the court below was that Pope Spring was a natural spring, but the trial court found against them and found it to be a spring artificially developed by Pope, and that its waters were private waters and the property of Pope, upon whose land it had been developed, and who, with others associated with him, had given the city the right to purchase the same by the contract heretofore referred to. These findings by the trial court are supported by ample evidence, and are binding upon this court, for it is a uniform rule that an appellate court will not disturb a finding of fact made by a trial court when there is evidence upon which the

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finding may reasonably be based. (Saratoga L. & L. Co. v. Jensen, 20 Wyo. 323, 123 Pac. 415.)

Hunt, as executor, could, of course, appropriate only public waters of the state, and, as the spring in question was not a natural spring, he could acquire no rights by his application.

"The water of all *natural* streams, springs, lakes or other collections of still water within the boundaries of the state are hereby declared to be the property of the state." (Sec. 1, Art. 8, Wyo. Const.)

Supervision of "the waters of the state" is vested in the Board of Control, subject to review by the courts. (Sec. 2, Art. 8, Idem.)

"A water right is the right to use the water of the state." (Wyo. 1910 Compiled Statutes, Sec. 724.)

Any person intending "to acquire the right to the beneficial use of the *public water of the state*" shall make an application to the State Engineer for a permit. (Idem, Sec. 727.)

That percolating waters developed artificially by excavation and other artificial means, as was done in this case, belong to the owner of the land upon which they are developed is supported by abundant authority. (Long on Irrigation, Secs. 93, 95 (2nd Ed.); Howard v. Perrin, 76 Pac. 460, 8 Ariz. 347; Ryan v. Quinlan et al., 124 Pac. 512, 45 Mont. 521; Vanderwork (Territory of New Mexico intervenor) v. Hemes et al., 110 Pac. 567, 15 N. M. 439; Metcalf v. Nelson, 65 N. W. 911, 8 S. D. 87, 59 Am. St. Rep. 746; Willow Creek Irrigation Co. v. Michaleson, 60 Pac. 943, 21 Utah 248, 51 L. R. A. 280, 81 Am. St. Rep. 687.)

Other matters are referred to in the brief of plaintiffs in error, but they are not, in our opinion, under the facts of this case, of sufficient importance to justify extended discussion.

We are of the opinion that the judgment of the court below should be affirmed, and it will be so ordered.

Affirmed.

POTTER, J., and WINTER, DIST. J., concur.

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HON CHARLES E. WINTER and HON. JAMES H. BURGESS, DISTRICT JUDGES, were called in to sit in place of BEARD, C. J., and BLYDENBURGH, J., who were unable to sit by reason of illness.

MILLER v. AMORETTI.

(No. 900; Decided June 3rd, 1919; 181 Pac. 420.)

BANKS AND BANKING—LIABILITY OF STOCKHOLDERS—STATUTORY CONSTRUCTION—AUTHORITY OF RECEIVER TO ENFORCE STOCKHOLDERS' LIABILITY IN A FOREIGN STATE—JUDGMENT OF FOREIGN STATE—FULL FAITH AND CREDIT—CONSTITUTIONAL LAW.

1. Revised Codes of Montana, Section 4012, providing that the stockholders of every banking corporation formed under the Chapter of which said Section is a part shall be liable to the extent of the par value of stock owned by them for corporation debts, is not confined in its operation to banking corporations organized under the act in which said Section appears, but applies to banking corporations existing at the time the act was passed.
2. The liability of a stockholder in a banking corporation organized under the Act of which Revised Codes of Montana, Section 4012, is a part, for a debt of a corporation to the extent of the par value of his stock, is contractual and runs directly to the creditors of such corporation. Such liability is not an asset of the corporation, and cannot be enforced by a general receiver of an insolvent banking corporation by action in a foreign State, where the Statute authorizing his appointment does not empower him to bring such an action in Montana.
3. This court, in deciding whether a receiver appointed in Montana can maintain an action in Wyoming to enforce the liability of stockholders of a bank under the Montana Statute, will follow a decision of the Montana Supreme Court, holding that the Statute created a right of action in creditors alone, though the action in which the decision was rendered was brought by creditors and the question arose only incidentally on the issue of a right to set-off by defendant of a claim against the defendant.
4. Where a receiver of an insolvent bank, in pursuance of an order of the appointing court, brought an action in a court of another State, to enforce the statutory liability of a

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stockholder, denial by such court of his right to recover does not violate Const. U. S., Art. IV, Section 1, requiring full faith and credit to be given in each State to the judicial proceedings of another State, since inqury into the foreign court's jurisdiction is not a denial of full faith and credit.

ERROR to District Court, Fremont County; HON. CHARLES E. WINTER, Judge.

Action by H. B. Miller as receiver of the Farmers State Bank of Bridger, Montana, a corporation, against Eugene Amoretti, Jr. Defendant demurred to the petition as amended, which was sustained, and thereupon the plaintiff excepted to the ruling and refusing to further plead, judgment was rendered and entered in favor of defendant. Plaintiff brings error.

E. H. Fourt, for plaintiff in error.

The Montana court adjudged insolvency and directed the receiver to proceed and collect from stockholders an amount equal to the par value of their stock; this is a final judgment of the Montana Court entitled to full faith and credit under the Federal Constitution; the liability of stockholders to creditors of the bank to the extent of the par value of their stock is fixed by the Montana Statute and is therefore a part of the contract under which the shares are taken. The Montana law also provides for the appointment of a receiver. This case is to be distinguished from McLaughlin v. O'Neil, 7 Wyo. 187, 51 Pac. 243, since in that case, the Utah court had not judicially found the amount of the deficiency. In the present case the Montana court has determined the liability. Nichols v. Board, 76 Pac. 681, sustains the point. There is no other proceeding provided by the laws of Montana, which could conflict or supersede the power and authority of the receiver in the present case. (See also Childs v. Blethen (Wash.), 82 Pac. 405; Finney v. Guy, 49 L. R. A. 486; State v. Union Stock Yards Bank, 70 N. W. 752.) The assessment of stockholders of an insolvent bank is a secondary remedy. A receiver takes possession of all property for the benefit of creditors and should

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be impowered to enforce every liability necessary to protect the rights of creditors. (Wilson v. Book, 43 Pac. 939.) Creditors cannot be permitted to supersede receivers in the exercise of this right without first showing good cause and obtaining leave of court in which the insolvency proceedings are pending. (Anderson v. Seymour, 73 N. W. 171; Bank v. Anderson, 73 N. W. 174; Miller v. Lane, 116 Pac. 58.) The Montana statute provides that stockholders shall be liable for all of the contracts, debts and engagements of the corporation and differs somewhat from double liability statutes in other states. It should, therefore, be left to the State of Montana to provide for the necessary arrangements and conditions under which the creditors may obtain money due them. In the following cases involving similar statutes the right of receivers to maintain actions against stockholders in foreign states has been maintained: Howarth v. Elwanger, 86 Fed. 54; McTammany v. Day, 128 Pac. 563; Waterson v. Materson, 46 Pac. 1041. In Iowa the statute provides that the stockholders are liable to creditors and in a suit brought in the State of Washington on the Iowa statute, it was held that the receiver of the bank was not a proper party to bring the suit; the distinction in the language of the Montana statute would appear to sustain the authority of a receiver of insolvent bank to maintain an action against stockholders in foreign states.

John Dillon and *Ralph Kimball,* for defendant in error.

It is not alleged that the corporation was organized under the statute creating a double liability of stockholders; this is necessary. (1 Cook Corps., Secs. 212-214.) The double liability of stockholders is for the benefit of the creditors only. It is not an asset of the corporation and a general receiver of the corporation has no right to enforce its payment in the absence of a statute giving him such authority. (1 Cook Corps. 218; Morse on Banks, 696; Zang v. Wyant, 56 Pac. 565; Adams v. Clark, 85 Pac. 642; Walsh v. Shanklin, 102 S. W. 295, 31 L. R. A. N. S. 365, and note 3 R. C. L. 414.) Even a receiver appointed especially for

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the creditors has been held to have no authority to enforce such liability. (McLaughlin v. Kimball, 58 Pac. 685.) A general receiver is without authority to enforce the liability. (McLaughlin v. O'Neil, 7 Wyo. 187.) There is but one case authorizing a receiver to maintain such an action. (Wilson v. Book (Wash.), 43 Pac. 939.) The Minnesota cases are based on a special statute authorizing a receiver to maintain actions of this character. Finney v. Guy and Stone v. Bank cited by plaintiff in error are not in point, nor is the Idaho case of McTammany v. Day. A recovery by the receiver will not discharge the liability existing in favor of creditors only.

POTTER, JUSTICE.

This is an action brought by the receiver of the Farmers State Bank of Bridger, Montana, to recover of the defendant as a stockholder of the bank an amount equal to the amount of his stock, alleged to be due under a statute imposing a liability to that extent, in addition to the amount invested in the stock, upon the stockholders of a banking corporation, severally and individually, for all contracts, debts and engagements of the corporation. Demurrers to the original and an amended petition having been sustained, a second amended petition was filed to which also a demurrer was filed and sustained, and thereupon, the plaintiff excepting to the ruling, and refusing to further plead, judgment was rendered and entered in favor of the defendant. The plaintiff brings the case here on error, assigning as error the order sustaining the demurrer to the second amended petition, and the rendering of judgment against the plaintiff.

The second amended petition alleges: That the Farmers State Bank of Bridger is, and at all the times mentioned in said petition was, a corporation duly organized under the laws of the State of Montana. That its principal place of business is at Bridger, in Carbon County, Montana. That on the 8th day of May, 1915, the said bank was insolvent and unable to pay its indebtedness, and its business had been suspended by order of the superintendent of banks of

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said state. That by an order of that date of the district court of the thirteenth judicial district of said state, in and for the county of Carbon, the plaintiff was appointed receiver of said bank, "to take charge of its property and assets, collect all indebtedness due it, and generally to manage its business and affairs subject to the direction and approval of said court"; and that at all times since said date the said plaintiff has been, and is, the duly appointed, qualified and acting receiver of said bank. That it is necessary to collect from each stockholder of the bank to apply on its indebtedness the full amount of money for which he is liable as such stockholder, to-wit: A sum equal to the par value of the capital stock owned and held by him in addition to the purchase price thereof. That a sum equal to the total amount of the capital stock of the bank, to-wit: The sum of thirty thousand dollars, if paid in full by the stockholders, together with all the property and assets of the bank, will be wholly insufficient to pay its indebtedness. That on the 10th day of June, 1915, the said court, by an order duly made and entered, authorized and directed the plaintiff, for the purpose aforesaid, to assess each stockholder in an amount equal to the par value of his stock, to demand payment thereof, and to take any action necessary to enforce collection of the same, said order in that respect reading as follows:

"H. B. Miller, receiver of the above named Farmers State Bank of Bridger, is hereby expressly authorized and directed to forthwith assess and demand from each of the above named stockholders of said bank the payment of an amount equal to the par value of the capital stock owned and held by him, and to be applied upon the indebtedness of said bank, and said receiver is hereby further authorized and empowered to bring such actions or take such other steps as he may find necessary to enforce the collection and payment of such assessments."

That the defendant at all the times mentioned in the petition has been, and is, the owner of twenty-five shares of the capital stock of said bank of the par value of one hundred

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dollars each, and is liable as such stockholder for the sum of twenty-five hundred dollars of the indebtedness of said bank; such liability arising under and by virtue of the provisions of section 4012 of the Revised Codes of the State of Montana, being a portion of the chapter of the Civil Code of that state entitled "Regulations of Banking Corporations", which said section reads as follows:

"The stockholders of every corporation formed under this chapter, or which may avail itself of its provisions, shall be severally and individually liable, equally and ratably, and not one for the other, for all contracts, debts and engagements of such corporation to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares."

That the district courts of the State of Montana are courts of original jurisdiction in all cases at law and in equity. That the statutes of Montana provide for the appointment of a receiver in cases where a bank fails or becomes insolvent. That it is provided by Section 50 of Chapter 9 of the laws of that state of 1889 as follows:

"Whenever the reserve of any bank shall fall below the amount required herein to be kept (fifteen per cent of deposit liabilities), such bank shall not increase its loans or discounts, otherwise than by discounting or purchasing bills of exchange payable at sight or on demand and the superintendent of banks shall notify any bank whose reserve may be below the amount herein required to make good such reserve, and in case the bank fails for thirty days thereafter to make good such reserve the superintendent of banks may notify the attorney general and he shall institute proceedings for the appointment of a receiver and to wind up the business of the bank."

That section 60 of the laws of 1889 provides:

"It appearing necessary to have a receiver appointed for any such bank or banks, the superintendent of banks shall make a full and complete statement of account and report to the governor with respect to the conditions of its business and affairs; and thereafter, should it appear to the gover-

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nor that application should be made for the appointment of a receiver, he shall thereupon direct the attorney general to file a petition in the District Court of the county in which the bank is situated asking for the appointment of a receiver, in the name of the State of Montana, and such a petition shall be controlling and by the Court so considered and acted upon, even though stockholders, creditors or others may have theretofore filed application for the appointment of a receiver."

That between the said 10th of June, 1915, and the commencement of this action plaintiff demanded of defendant the payment of an amount equal to the par value of his stock, but that the latter has failed, neglected or refused to pay the same or any part thereof, and that there is now justly due and owing from the defendant to the plaintiff, by reason of the facts aforesaid, the full sum of twenty-five hundred dollars, no part of which has been paid. That on the 18th day of November, 1916, in the said district court, in said state, the said receivership being under consideration, and upon proceedings duly had in said court, the said court found that at the time of the appointment of said receiver, and that at all times since said date, the assets of the said bank have been and are of less amount than its liabilities. That said bank was and is wholly insolvent and that its liabilities exceed the assets by more than fifty-four thousand dollars. That the holders of said stock at the date of the appointment of the receiver are each liable, severally and individually, equally and ratably, for the debts of said bank, to the extent and amount invested by them, and that it was ordered, adjudged and decreed by said court, that said bank was then wholly insolvent, that the proven liabilities exceed the value of the assets by the sum of $54,000.00, that the receiver proceed by legal action to enforce the liability of the holders of the capital stock of said bank as provided by section 4012 of the Civil Code of the State of Montana, and that the said receiver is authorized to take whatever steps are necessary to secure the payment of said liability.

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The demurrer states three grounds: 1. That the court has no jurisdiction of the subject of the action. 2. That the plaintiff has no legal capacity to sue. 3. That the petition does not state facts sufficient to constitute a cause of action. Two points are urged in support of the order sustaining the demurrer and the judgment thereon. 1. That the petition fails to show a double liability on the part of stockholders under the statute pleaded declaring such a liability, for the reason that it does not allege that the bank was organized under the law containing the provision imposing the liability. 2. That the petition fails to show any authority in the receiver to sue for and recover from the stockholders the amount of such liability.

The first point is based upon the words of the section of the Montana statute (Sec. 4012, Rev. Codes) imposing the liability upon stockholders of every corporation "formed under this chapter, or which may avail itself of its provisions"; by reason of which it is contended for the defendant that no such liability is created except on the part of stockholders of a banking corporation organized under the law containing said provision subsequent to the enactment of the statute. If the statute had not been construed by the Supreme Court of Montana with reference to the words upon which said contention is made, we would not be inclined to consider this point, since we regard the question as to the right of the receiver to sue, suggested by the second point, as the principal and decisive question in the case. But that court has construed the section against the defendant's contention, holding that the words "formed under this chapter or which may avail itself of its provisions" have no place in the section and cannot be assigned any meaning, and that the provisions of the act applied to existing concerns, as well as those thereafter to be organized; and as so construed the section imposing the liability was held to be valid. (Barth v. Pock, 51 Mont. 418, 155 Pac. 282.)

The question suggested by the second point, whether, upon the facts alleged, the stockholders' liability under the

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statute pleaded may be enforced in an action brought by the receiver to recover the amount, is broader than the jurisdiction of this court to decide, for it involves the right of the receiver to sue in the state in which he was appointed, and this court can only conclusively determine his right to sue in this state, and the question as presented by the facts is, of course, limited to the right to sue in this state. But for the purpose of deciding that question it is proper first to inquire as to the receiver's authority in the state of his appointment. If he is not authorized to maintain a suit of this character in that state, where the liability is imposed, he would certainly not be entitled to maintain such a suit in a foreign state, either as of right or by comity. (Evans v. Nellis, 187 U. S. 271, 23 Sup. Ct. 74, 47 L. Ed. 173; Hale v. Allinson, 188 U. S. 56, 23 Sup. Ct. 244, 47 L. Ed. 380.)

It is well settled that under a statute like that in Montana the liability of the stockholder is contractual, that it is not an asset of the corporation, nor enforceable by an assessment upon stockholders by or for the corporation, but that it is created exclusively for the benefit of, and runs directly to, the creditors. And the general and prevailing rule, sustained by the great weight of authority, is that the liability cannot be enforced by a general receiver of the insolvent corporatoin, unless authorized to do so by statute, either expressly or as judicially construed, or the liability is declared by statute to be an asset of the corporation. (1 Cook on Corp., 6th Ed., Sec. 218; 3 Clark & Marshall Priv. Corp., Secs. 820, 821; 3 R. C. L. 414; 23 R. C. L. 119; 7 C. J. 518; 2 Morse on Banks & Banking, 5th Ed., 696; Jones on Insolv. Corp., Sec. 543; Williams v. Carver, 171 Cal. 658, 154 Pac. 472; Zang v. Wyant, 25 Colo. 551, 56 Pac. 565, 71 Am. St. Rep. 145; Bank v. Scott, 144 Ky. 575, 139 S. W. 801; Runner v. Dwiggins, 147 Ind. 238, 46 N. E. 580, 36 L. R. A. 645; Golden v. Cervenka, 278 Ill. 409, 116 N. E. 273; Van Tuyl v. Carpenter, 135 Tenn. 629, 188 S. W. 234; McLaughlin v. Kimball, 20 Utah 254, 58 Pac. 685, 77 Am. St. Rep. 908; Steinke v. Loofbourow, 17 Utah 252, 54 Pac. 120; Hale v. Allinson, 188 U. S. 56, 23 Sup. Ct. 244, 47 L.

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Ed. 380; Finney v. Guy, 187 U. S. 335, 23 Sup. Ct. 558, 47 L. Ed. 839.)

In Morse on Banks and Banking, after stating who may sue for unpaid installments upon subscription for shares, it is said: "But if the demand is for further contribution beyond the amount of the par value of the shares already paid or due under the original subscriptions, then it would seem that, unless the statute expressly makes the sums thus contributed assets of the corporation, and directly gives the right of collection to the receiver or trustee, the suit should properly be brought by the creditors whose claims are to be paid out of the proceeds. It is their sole and peculiar right which they are at liberty to enforce when they please or altogether to forego. There seems to be no ground upon which any other person could sustain suits of this description, and hence it has been regarded as proper for the creditors themselves to bring them."

The principle is stated in Clark & Marshall on Private Corporations at the section cited as follows:

"In the absence of provision to the contrary, the individual liability for corporate debts imposed upon the stockholders of a corporation by a charter, statutory, or constitutional provision is solely for the benefit of, and directly to, creditors, and they only can enforce the same. The liability is not imposed for the benefit of the corporation, and is not in any sense a part of the assets, like unpaid subscriptions of stock, and, unless so provided by statute, it cannot be enforced by the corporation itself, by assessment or otherwise, even for the purpose of raising a fund for the payments of debts. It follows that the liability does not pass under an assignment by the corporation for the benefit of creditors, so as to entitle the assignee to enforce it; nor, in the absence of provision to such effect, can the liability be enforced by an assignee or receiver in bankruptcy or insolvency of the corporation, or by an agent appointed by the stockholders to wind up the affairs of the corporation, or by a receiver appointed by a court of equity, whether appointed at the suit of a stockholder or at the suit of a creditor, and whether he

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is a general receiver invested with all the 'estate, property, and equitable interests of the corporation,' or a special receiver appointed for the purpose."

In 7 Corpus Juris 518, it is said on this subject: "Under some statutes the action to enforce the liability of stockholders is properly brought by the receiver of the bank, or it may be brought either by the receiver or by the creditors; but whether the statute does not designate by whom such an action shall be brought, the right of a receiver to sue depends on the view taken of the character of the stockholders' liability, so that, if it is regarded as a corporate asset, the receiver can sue therefor, while, if it is not so regarded, a suit cannot be brought by the receiver, but only by the creditors."

It seems clear that where, in addition to imposing the liability upon stockholders, the statute declares such liability an asset of the corporation, the receiver is vested with title thereto and the right to enforce it. Some statutes so providing go beyond that and also provide for the enforcement of the liability by the receiver, assignee, or other officer having the right to collect and distribute the corporate assets. Where, without declaring the liability to be an asset of the corporation, the receiver is required or authorized to enforce the liability, it is held that he is not then merely the ordinary chancery receiver, but that the legal effect of such provision is to make him a quasi assignee and representative of the creditors, vested as such with their rights of action against stockholders; and upon that ground his right to sue in a foreign jurisdiction is sustained. (Bernheimer v. Converse 206 U. S. 516; 27 Sup. Ct. 755, 51 L. Ed. 1163; Converse v. Hamilton, 224 U. S. 243, 32 Sup. Ct. 415, 56 L. Ed. 749, Ann. Cas. 1913, p. 1292; 1 Cook on Corp., 6th Ed., 218.)

And the right of the receiver to maintain such an action in a foreign state is sustained also where the statute, though silent as to the procedure for enforcing the liability, has been construed by the highest court of the state in which it was enacted as requiring or authorizing the liability to be en-

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forced by the receiver, and upon substantially the same ground as where the power is expressly conferred by the statute. (Howarth v. Lombard, 175 Mass. 570, 56 N. E. 888, 49 L. R. A. 301; Howarth v. Angle, 162 N. Y. 179, 56 N. E. 489, 47 L. R. A. 725; Howarth v. Ellwanger, 86 Fed. 54.) These cases were brought by a receiver appointed in the State of Washington, to recover upon the liability of stockholders imposed by the constitution and a statute of that state, under which, as construed by the Supreme Court of the state, in connection with other statutes, the liability becomes part of the corporate assets and is enforceable only by a receiver of the insolvent bank. (See Wilson v. Book, 13 Wash. 676, 43 Pac. 939.)

And in Howarth v. Lombard, *supra,* said construction was held to be binding upon the Massachusetts court. In Howarth v. Angle, the court said that the "implied promise" of the stockholder as to such statutory liability "runs to the creditors, and may, *according to the common law of the state where it was made,* be enforced for the benefit of creditors by a receiver of the corporation appointed to wind up its affairs"; and, further, referring to the decision of the Supreme Court of Washington respecting the nature of the liability: "The statutory liability of stockholders is an asset of the insolvent bank, 'the title to which was in said receiver, as a trust fund for the purpose of satisfying the claims of' creditors." In Howarth v. Ellwanger, the court said: "The courts of Washington have decided that this liability can only be enforced by a receiver under the direction of the court. (Citing cases.) The practical effect of a ruling that a receiver cannot maintain the suit would be to render the law nugatory as to all but resident creditors. The Washington courts having ruled that a receiver only can bring the suit, it is manifest, should the federal courts and other state courts hold that he cannot maintain the action, that the defendant not only but all stockholders beyond the jurisdiction of the Washington courts will escape a liability intended to be uniform and for the benefit of all creditors."

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The distinction in this respect, under the decisions above referred to, between an ordinary chancery receiver and one who is authorized by statute to enforce the liability, when the action is brought in a foreign jurisdiction is well illustrated by two cases above cited decided by the Supreme Court of the United States: Hale v. Allinson, 188 U. S. 56, 23 Sup. Ct. 244, 47 L. Ed. 380, and Converse v. Hamilton, 224 U. S. 243, 32 Sup. Ct. 415, 56 L. Ed. 749, Ann. Cas. 1913, D. 1292. Each was an action brought by a receiver of an insolvent Minnesota corporation to enforce an alleged double liability under the constitution and statutes of that state In Hale v. Allinson it appeared that the statute provided a remedy for enforcing the liability, which did not include or authorize an action by the receiver. And the Supreme Court of Minnesota had decided that the statute provided the only remedy, a single action, in which all persons having or claiming an interest in the subject should be joined or particularly represented, and their respective rights, equities and liabilities finally settled and determined: that the receiver of an insolvent corporation was not a proper person to bring such action; and that a receiver could not maintain an action to enforce the superadded liability. The action was brought in a circuit court of the United States in Pennsylvania, where a demurrer to the bill was sustained; the demurrer stating, among others, two grounds, upon each of which it was held that the judgment sustaining the demurrer should be affirmed, viz: (1) That the receiver had no right to sue in the courts of a state foreign to that in which he was appointed. (2) That if he had a right to sue there, no ground of equitable jurisdiction was set forth in the bill, but the remedy, if any, was at law. We are concerned here principally with the discussion of the first ground.

Having referred to the decisions of the Minnesota Supreme Court denying the right of the receiver to maintain an action to enforce the liability, the court said:

"If a receiver cannot maintain this kind of an action in the courts of his own state, because its statute provides

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another in the name of a creditor, or permits it only after the performance of conditions precedent which he has not performed, he cannot, although appointed in the State, maintain such action in a foreign jurisdiction. * * * This would seemingly be enough to compel the affirmance of the judgment herein, when we see that the Minnesota Supreme Court has held that a receiver cannot maintain such an action as this in the courts of that state. * * * We are of opinion, following the decisions of the highest court of Minnesota, that the statutes of that state do not provide for the appointment of a receiver to recover as such the amount of the added liability of the non-resident shareholders to creditors of an insolvent corporation. They do not provide that such liability shall be assets of the corporation, to be recovered by the receiver and payable to its creditors when such liability is enforced and the money recovered. There is no transfer of any right or title to a receiver to enforce the liability (certainly not as to non-resident stockholders), nor is it a case where any assignment of such right by the creditors has been made, so that the receiver is, in fact, an assignee of the persons interested in the recovery from the stockholders."

And the court said further that it was a simple case of the appointment, authorized by statute, of a receiver by a court of equity in the exercise of its general jurisdiction, with no title to the fund in him, "and where he acts merely as the arm of the court without any other right or title," and that "the question of comity cannot avail in a case where the courts of the state in which the receiver was appointed hold that an action similar to the one brought in the foreign jurisdiction cannot be maintained by him in the courts of the state of his appointment."

In that case it appeared also that the receiver, by order of the court appointing him, had been "authorized, empowered and directed to institute and prosecute all such actions or proceedings in foreign jurisdictions as may be necessary" for the purpose of enforcing the liability of non-resident stockholders. As to that matter, the court said

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that the non-resident stockholders were only nominal parties in the Minnesota suit; that no service of process was made upon one of them; that no judgment was rendered against them; and that the action was not, therefore, ancillary or auxiliary to the Minnesota decree, and did not aid in the enforcement of that decree because there was no decree against such stockholders to be enforced.

It appeared in the case of Converse v. Hamilton, which had been brought in a state court in Wisconsin, that another statute had been enacted in Minnesota not involved in the case of Hale v. Allinson, which prescribed the mode of enforcing the liability pursued in the case then before the court, that by such later statute provision was made for bringing in all creditors into a sequestration suit, for the presentation and adjudication of their claims, ascertaining the relation of the corporate debts and expenses of receivership to the available assets, and whether and to what extent a resort to the double liability of stockholders was necessary, for levying assessments upon stockholders necessary to pay the debts, and for investing the receiver with authority to collect such assessments on behalf of the creditors, and to maintain actions therefor against each stockholder, severally, in Minnesota "or in any other state or country where such stockholder, or any property subject to attachment, garnishment or other process in an action against such stockholder may be found."

Referring to that statute, after stating that under the earlier statute, a receiver could not sue on behalf of the creditors in a home court or elsewhere, citing Hale v. Allinson, *supra,* and Finney v. Guy, 189 U. S. 335, 23 Sup. Ct. 558, 47 L. Ed. 839, the court said:

"Under this statute, as interpreted by the Supreme Court of the state, as also by this court, the receiver is not an ordinary chancery receiver or arm of the court appointing him, but a quasi-assignee and representative of the creditors, and when the order levying the assessment is made he becomes invested with the creditors' rights of action against the stockholders and with full authority to enforce the same in any

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court of competent jurisdiction in the state or elsewhere. (Straw & Ellsworth Co. v. Kilbourne Co., *supra;* Bernheimer v. Converse, *supra.*) * * * It is true that an ordinary chancery receiver is a mere arm of the court appointing him, is invested with no estate in the property committed to his charge, and is clothed with no power to exercise his official duties in other jurisdictions. (Booth v. Clark, 17 How. 322, 15 L. Ed. 164; Hale v. Allinson, 188 U. S. 56, 23 Sup. Ct. 244, 47 L. Ed. 380; Great Western Mining and Mfg. Co. v. Harris, 198 U. S. 561, 25 Sup. Ct. 770, 49 L. Ed. 1163.) But here the receiver was not merely an ordinary chancery receiver, but much more. By the proceedings in the sequestration suit, had conformably to the laws of Minnesota, he became a quasi-assignee and representative of the creditors, was invested with their rights of action against the stockholders, and was charged with the enforcement of those rights in the courts of that state and elsewhere. So, when he invoked the aid of the Wisconsin court the case presented was, in substance, that of a trustee, clothed with adequate title for the occasion, seeking to enforce, for the benefit of his *cestuis que trustent*, a right of action, transitory in character, against one who was liable contractually and severally, if at all."

The court, in the same opinion, had said that "the liability is not to the corporation but to the creditors collectively, is not penal but contractual, is not joint but several, and the mode and means of its enforcement are subject to legislative regulation."

Now, in the case here, while the petition alleges that the stockholder is liable to the extent of the par value of his stock for the bank's indebtedness, and sets out the statute declaring the liability, and also two sections providing for the appointment of a receiver under stated conditions, the matter of the recovery of the liability is not mentioned in either of the sections pleaded, and it is not alleged or claimed that there is any statute in Montana prescribing the procedure or method for enforcing such liability, or declaring that the receiver shall have power or authority to enforce

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or collect the same, or directing that he do so, or that the statutes set out in the petition have been construed by the Supreme Court of Montana as conferring such authority upon the receiver. Some contention is made upon the provision that the attorney general's petition for the appointment of a receiver "shall be controlling and by the court so considered and acted upon, even though stockholders, creditors or others may have filed application for the appointment of a receiver." But that provision does not seem to mean anything more than that the receiver shall be appointed in the proceeding instituted by the attorney general, by direction of the governor, rather than in another pending proceeding brought by stockholders or creditors, in case of conflict between any such proceedings.

Upon the allegations of the petition, therefore, the case seems to be controlled by the general rule that the liability is not an asset of the corporation, but runs directly to the creditors, and is not enforceable by a receiver having no greater rights than the ordinary chancery receiver. And there is nothing in the statutory provisions for the appointment of a receiver, set out in the petition, making him anything more than an officer or the arm of the court appointing him for the collection and distribution of the corporate assets, and to wind up the business of the bank. The conclusion would necessarily follow, in our opinion, that the receiver does not show a right to maintain this action.

But we are materially aided in thus interpreting the statutes by the officially published decisions of the highest court in Montana on the subject, for we find that the statutes have been considered and construed by the Supreme Court of that state. In a decision by that court in November, 1914, it was held that the receiver of an insolvent bank, like the receiver in charge of the estate of any other insolvent, is the arm of the court to accomplish the distribution of the assets of the insolvent, and occupies a position in no respect different from that of the insolvent prior to the appointment; and that he becomes merely the assignee of the insolvent, and has exactly the same rights. (Williams v.

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Johnson, 50 Mont. 7, 144 Pac. 768, Ann. Cas. 1916D, 595.) In a more recent case, in which the receiver in this case appears to have been a party representing the same insolvent bank, the same court again had occasion to consider the character of such a receivership, and said: "A receivership and an assignment for the benefit of creditors are two different things. (Babcock v. Maxwell, 21 Mont. 507, 513, 54 Pac. 943.) But this court has said that the position of a receiver is no better and no higher than that of an assignee; he occupies a situation not materially different from that of the insolvent prior to the appointment; he is the arm of the court to accomplish, when necessary, the distribution of the assets of the insolvent according to the rights of those entitled thereto." (Citing Williams v. Johnson, *supra.*) (Aetna Acc. & Liability Co. v. Miller, Receiver of Farmer's Bank of Bridger, 54 Mont. 377, 170 Pac. 760, L. R. A. 1918C, 954.) And in Barth v. Pock, 51 Mont. 418, 155 Pac. 282, that court held that the receiver of an insolvent bank cannot maintain an action to enforce the liability of its stockholders under the statute aforesaid, and that it can only be enforced by creditors.

That case was decided in December, 1915, prior to the filing of the first amended petition in this case, and nearly a year before the second amended petition was filed. In that action, which was brought, apparently by creditors, against certain stockholders of an insolvent bank, the State Savings Bank of Butte, to enforce their liability under the Montana statute, the court had before it two questions affecting that liability: First, the stockholder's right to set-off against his liability the amount of the bank's indebtedness to him, and, second, the liability of a stockholder upon stock which had been donated by him to the bank some time prior to its suspension for the purpose of increasing its surplus and providing a fund to pay losses incurred by the bank, and which remained unsold at the time of its failure. Explaining the reasons for denying the asserted right of set-off, and holding the stockholder liable on the unsold donated stock, the court defined the nature of the liability under the

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statute, and declared that it could not be enforced by the bank or its receiver, but only in a suit by creditors. When discussing the alleged right of set-off, the court said:

"The double liability of a stockholder in a banking corporation is in its nature contractual and not penal. * * * The liability is several and individual, created by statute in favor of all who are creditors at the date of the bank's failure. Under this statute, the fund collected from an assessment upon the stock is held in trust for a ratable distribution among all the creditors, and its character is such as to preclude the idea that a stockholder may have his creditor's claim set off against his stockholder's liability. The two claims do not arise in the same right. His claim is against the bank, while his liability is to the creditors—not to the bank." And, considering the question of the liability upon the donated stock, upon the contention that under the decisions of the court to the effect that a domestic corporation may purchase its own stock it must also have the right to accept a gift thereof, resulting in relieving the stockholder from liability upon the stock so donated, the court said, after stating that a distinction is clearly drawn in that state between a trading and a banking corporation:

"The statutory double liability of a stockholder is peculiar to the law governing banking corporations—including therein trust companies. The creditor of a trading corporation must look to the corporation's assets for the discharge of his claim, but, in a sense, the creditor of a banking corporation has double security. He may look to all the assets of the bank in the first instance, and, if they are not sufficient, he may then call upon the stockholders to contribute a fund which may equal the par value of the entire authorized capital. Over such fund the corporation has no control. It cannot release a stockholder from all or any portion of his liability, and neither it nor the receiver in charge of its affairs can even maintain an action for its enforcement for it is not a corporate asset. (Zang v. Wyant, 25 Colo. 551, 71 Am. St. Rep. 145, 55 Pac. 565: Farmers' Bank v. Scott, 144 Ky. 575, 139 S. W. 901.) It

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is a reserve trust fund created for the benefit of creditors, and under our statute must be distributed ratably to all of them. Its character is so far distinct that collection can be enforced only at the suit of all the creditors or by one or more creditors for the use and benefit of all. (Bank v. Scott, above; 3 Clark & Marshall on Private Corporations, p. 2584; 3 R. C. L. 412.)"

That construction of the statute by the Montana Supreme Court is certainly persuasive as to its interpretation in this case, and should be followed by this court, even if we might be of the opinion that it should be construed otherwise, unless it was not necessary to a decision of any question then before the court. And we do not feel at liberty to regard it as mere dictum. The statement that an action to enforce the liability cannot be maintained by the receiver of the bank may not have been necessary, since it does not appear that the receiver was a party to the case. But creditors were parties, as we understand the case, seeking as plaintiffs to recover upon the liability, and the court's statement that collection can be enforced only by the creditors or by one or more creditors for the use and benefit of all seems to have been pertinent, though perhaps outside the issues presented by the defenses considered in the opinion; and the result was an affirmance of a judgment in favor of the creditors.

If the statement as to the right of a receiver to enforce the liability might be held so far from necessary to a decision of the case as to amount to mere dictum, what was said as to the nature of the liability—that it is not a corporate asset, that the corporation has no control over it, that neither it nor its receiver can release a stockholder from his liability, and that the liability is to creditors and not to the bank, cannot, we think, be considered as unnecessary to a decision in the case upon the questions presented. That the liability is to the creditors and not to the bank was stated as a reason precluding the idea that a stockholder might have his claim as a creditor set off against his liability. That it

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is not a corporate asset, or, when collected, a fund over which the corporation has any control, and that the bank cannot release the liability, were stated as grounds for the conclusion that a donation by a stockholder of part of his stock to the bank did not relieve him from liability thereon, where it remained unsold at the time of the bank's failure. And upon these several points so decided, and the other decisions of the Montana court above cited holding that the receiver of an insolvent bank is the arm of the court for distributing the corporate assets, that he is merely the assignee of the insolvent, that he occupies a position in no respect different from that of the insolvent prior to his appointment, and has exactly the same rights, it would follow, and we might reasonably expect said court to hold, that an action could not be maintained by the receiver to enforce the statutory liability of stockholders. What was said as to that matter does not appear to have been questioned in any subsequent case, and we think it may be accepted as controlling the procedure in Montana respecting the authority of the receiver to enforce such liability. It is in harmony with the prevailing rule which, in the absence of a ruling in Montana to the contrary, we would feel compelled to hold applicable upon the facts in the case.

It is chiefly argued by counsel for the receiver that a decision denying his right to recover upon the liability will violate section 1 of article IV of the Federal Constitution requiring that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. But it is well settled that said provision does not prevent an inquiry into the jurisdiction of the court which rendered the judgment over the subject matter, or the parties affected by it, or into the facts necessary to give the original court jurisdiction. (2 Watson on the Const. 1196; Tucker on the Const., sec. 306; Simmons v. Saul, 138 U. S. 439, 11 Sup. Ct. 369, 34 L. Ed. 1054; Thompson v. Whitman, 18 Wall. 457, 21 L. Ed. 897; Reynolds v. Stockton, 140 U. S. 254, 11 Sup. Ct. 773, 35 L. Ed. 464.) And the

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contention here is completely answered in Hale v. Allinson, *supra,* where a similar, but much clearer and more comprehensive, order had been made by the court appointing the receiver; and, also, under like conditions, in Finney v. Guy, *supra.*

The contention was directly made in Finney v. Guy, that the Wisconsin court had failed to give full faith and credit to the laws and judgments of the state of Minnesota, but it was held by the Supreme Court of the United States that in refusing to allow the receiver appointed in Minnesota to maintain the action, although he had been expressly authorized to proceed against stockholders in other jurisdictions by an order of the court appointing him, the courts of Wisconsin did not fail to give full faith and credit to the laws and judgments of Minnesota, since the Supreme Court of Minnesota had decided that the liability was not enforceable by the receiver.

We conclude that it was not error to sustain the demurrer, and the judgment will be affirmed. *Affirmed.*

BEARD, C. J. concurs.

BLYDENBURGH, J., being ill, did not participate in the decision.

MILLER v. PALMER.

(No. 901; Decided June 3rd, 1919; 181 Pac. 427.)

ERROR to District Court, Fremont County, HON. CHARLES E. WINTER, Judge.

Action by H. B. Miller, as receiver of the Farmers' State Bank of Bridger, Montana, a corporation, against Mrs. J. L. Palmer, nee Mrs. Marie Amoretti. From the court's ruling in sustaining a demurrer to plaintiff's amended petition and a judgment entered for defendant, plaintiff brings error. Briefs filed by counsel in this case were the same as were filed in Miller v. Amoretti, No. 900, reported in this volume.

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POTTER, JUSTICE.

This case involves the same questions and upon the same facts that are considered in Miller, as Receiver, v. Amoretti, this day decided. The two cases were submitted together. It is alleged that Mrs. Palmer, the defendant, is the owner of twelve and one-half shares of the stock of the Farmers' State Bank of Bridger, Montana, and it is sought to recover, in this suit by the receiver of said bank, her super-added liability, under the Montana statute. A demurrer to the petition, as amended, was sustained, and upon the plaintiff refusing to further plead, judgment was rendered for the defendant. The case being here on error, the judgment is affirmed on the grounds and for the reasons stated in the opinion in the case aforesaid of Miller v. Amoretti.

Affirmed.

BEARD, C. J., concurs.

BLYDENBURGH, J., being ill, did not participate in the decision.

GRAVES v. BURCH.

(No. 916; Decided June 3rd, 1919; 181 Pac. 354.)

BILLS AND NOTES—EXTENSION—CONSIDERATION—MORTGAGES—FORECLOSURE—DEMAND—ATTORNEY'S FEES—EQUITY—SUFFICIENCY OF TENDER—INTEREST.

1. Where the maker of a note and mortgage past due informed payee by telephone that she would borrow money and pay him if he desired, and he replied that he did not need the money and that she should not worry herself about it, there was not a definite extension of time of payment, nor consideration sufficient to make a binding extension.
2. No previous demand is necessary to authorize a suit to recover upon a note and mortgage past due.
3. A previous demand for payment of a past due debt is not generally necessary to a recovery of attorney's fees provided for in a note or mortgage.
4. A provision for attorney's fees in a note or mortgage is a contract of indemnity in the nature of a penalty, as distinguished from liquidated damages, to compensate payee

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for expense incurred or liability for expense created through the fault of the maker or mortgagor. Such fees even where fixed by stipulation for a stated amount are within the equitable control of the court to allow only such sums as may be reasonable and may be disallowed altogether under circumstances rendering a recovery inequitable or unconscionable.

5. Where the payee in a note secured by mortgage past due lulled the maker into a sense of security by stating that he was not needing the money and that she need not worry about the payment, it would be inequitable to allow the recovery of attorney's fees provided for in the note, where foreclosure proceedings were brought without further notice, giving the debtor an opportunity for payment; mortgagee upon suit being brought tendering the amount due.
6. Where a payee in a note secured by a mortgage was not equitably entitled to attorney's fees, having lulled the maker into a sense of security by informing her that there would be no immediate foreclosure, an assignee of the mortgage and note after the note was overdue, took them subject to the equities existing at the time of the assignment and was not entitled to attorney's fees where he immediately brought suit to foreclose without notice.
7. In an action to foreclose a mortgage, the principal of which was payable in monthly installments, some of which were not made promptly, which rendered computation of interest difficult, a tender of the amount demanded, in a petition for forclosure, with interest to date and court costs, will not be held ineffective, although more money was actually due, the difference being deposited in court upon amendment of the petition by plaintiff; and a tender and deposit in court will not be held insufficient, although lacking a few cents to cover the exact amount, where the only controversy in the case was as to whether plaintiff was entitled to attorney's fees.
8. In a mortgage foreclosure, where mortgagor made a tender and deposit in court of the amount demanded in the petition, together with interests and costs to date of deposit, but it was found that plaintiff had erred in computing the interest, leaving a difference, which the defendant at once deposited, the defendant should not be required to pay interest upon the amount originally tendered and deposited.

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ERROR to District Court, Fremont County, HON. CHARLES E. WINTER, Judge.

Action for the foreclosure of a mortgage by I. L. Burch against Cora E. Graves and another.

From a judgment for plaintiff which included an allowance of interest and attorney's fees after tender, defendants bring error.

E. H. Fourt, for plaintiffs in error.

Plaintiffs in error offered to make payment before suit and were informed that they need not worry about payment, as mortgagee did not need the money. Mortgagor thereafter assigned the note and mortgage to defendant in error, who commenced foreclosure proceedings; a tender of the amount due less attorney's fees was made at the time of answer; the note was past due on the date of assignment; defendant in error is not a holder in due course. (Comp. Stats., sec. 3216.) A court of equity will relieve against a forfeiture or penalty in a contract and decree specific performance, if possible, between the parties. (Willard's Equity 56.) Defendant in error having accepted the note after it was due gave it the status of a demand note. (Comp. Stats., sec. 3165.) A demand was necessary in order to recover attorney's fees provided for. Attorney's fees are a penalty. (Witherspoon v. Mussleman, 14 Bush. 214; Prescott v. Grady, 27 Pac. 35 (Calif.).) An attorney fee cannot be included until a demand has been made. (Clemens v. Loose, 35 Pac. 1032.) There was an extension at the time. (Drake v. Bank, 96 Pac. 999.) There was no waiver of the terms and conditions of the note.

John J. Spriggs, for defendant in error.

The tender was insufficient and properly refused. The services of an attorney was necessary to enforce payment, there being a default. A tender which does not include attorney's fees is insufficient. (Bank v. Howard, 158 Pac. 927.) Attorney's fees are not held to be uncollectable. (Bovee v. Holland, 156 Pac. 417; Const. Co. v. Sutherland,

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150 Pac. 209; Comp. Stats., sec. 3160; Baker Co. v. Sherman, 122 Pac. 235.) Presentment and demand were waived in the note. (Section 3240, Comp. Stats. 1910.) Section 3165, Comp. Stats., refers to persons secondarily liable and are not in point. The instrument was not one including a drawer or acceptor and was not drawn, issued or accepted after due. It was endorsed after due and as to the endorser was payable on demand. The judgment should be affirmed.

POTTER, JUSTICE.

This is an action upon a promissory note and real estate mortgage securing the same, executed by the plaintiffs in error, Cora V. Graves and Karl DeF. Graves to one John Findlay and assigned to the defendant in error, I. L. Burch, to recover judgment upon the note for an unpaid balance due thereton and for the foreclosure of the mortgage. The note and mortgage were assigned to Burch on March 10, 1916, and the action was commenced on the following day, March 11, 1916, and there was endorsed on the summons, as demanded by the precipe, the following: "Civil action for the recovery of money only. Amount claimed, $314.46, and mortgage foreclosure, for which plaintiff will take judgment if defendant fails to answer."

As set out in the petition and shown by the evidence, the note was dated October 4, 1910, and was given for the sum of $800.00, with interest at the rate of ten per cent per annum from date until paid, payable by monthly installments of twenty dollars each until the principal sum and interest shall be fully paid. It expressly provides that the monthly payments shall be applied, first to payment of accrued interest, and the balance upon the principal. It contains also the following provisions: "In case payment shall not be made at the times and as herein provided, we further promise and agree to pay costs of collection, including the further and additional amount of one hundred dollars on said principal sum of this note for attorney's fee, and if any suit or foreclosure proceedings be commenced for the collection of any amount unpaid on this note, said fees shall

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be added to and included in any judgment hereon. And the makers of this note hereby waive presentation for payment, notice of non-payment, and jointly and severally consent that time of payment may be extended without notice thereof." The mortgage also contains a provision for one hundred dollars attorney, solicitor and counsel fees to be retained out of money arising from the sale of the property authorized thereby upon default in payment of principal or interest or any part thereof, and that in any proceeding in equity to foreclose the mortgage said solicitor fees shall be taxed as costs in said action.

The petition alleges a large number of payments endorsed on the note, and the dates thereof respectively commencing with Oct. 31, 1910, as the date of the first payment of $20, and ending with the payment of a like sum on Oct. 12, 1915; said last payment being endorsed as the payment due for February, 1914. Judgment was prayed for $174.21, the balance due upon the principal of the note, $37.00 interest due at the date of commencing the action, $3.25 for insurance premium paid, and the further sum of $100.00 for attorney fees; and for the sale of the mortgaged premises to satisfy the same. It will be noticed that the total of the sums stated is $314.46, the amount endorsed upon the summons, and that, omitting the attorney fee and insurance premium, the amount claimed would be $211.21.

The answer, filed April 7, 1916, admits the execution of the note and mortgage, and alleges that after the note became due and before it was assigned to plaintiff, the defendants obtained an extension of time for the payment of the balance due, that the payee, Findlay, told them that no advantage would be taken of them or expense incurred and that they might have additional time to pay the balance, and that relying on that promise, and in consideration thereof, the defendants "made additional payments as they could". That defendants were not notified of the assignment and no demand for payment was made upon either of them prior to commencing the action. That the plaintiff knew the note was past due when assigned to him. That the assignment

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was a breach of faith and a fraud upon defendants. That on March 28, 1916, the defendants tendered to plaintiff the sum of $225.00, being the amount due upon the note with court costs to that date, which tender was refused by the plaintiff, and that the defendants tender said sum into court, being all that is due at the time of filing the answer. That the commencement of suit without demand or notice is "vexatious, unconscionable and inequitable and the defendant (plaintiff) ought not to be permitted to obtain any judgment for costs or attorneys' fees against the defendant." We do not find any reply to the answer in the record.

The evidence shows that on the same day that the answer was filed the sum of $225 was deposited with the clerk of court by counsel for defendants "as tender to I. L. Burch by Cora V. Graves, to remain in court for claim on note, interest and costs to March 28, 1916." On the trial the plaintiff testified that there had been an error in the calculation of the interest due on the note, and that the amount actually due for interest when suit was commenced was $72 instead of $37, as alleged in the petition, but he also testified that the amount of principal and interest then due was $237.42. The court found that the amount then due was $237.21. And the record shows that during the trial, "plaintiff having testified * * * that the sum of twelve dollars was due in addition to the amount claimed in his petition, the defendants thereupon tendered and paid to the clerk said sum of $12."

Judgment was rendered for the sum of $351.38, the total of the following items: $237.20, principal and interest due at the commencement of the action; $14.18, interest on said sum to December 16, 1916, the date of the judgment; and $100 attorney's fees. Together with the costs of the action taxed at $7.65. And a sale of the mortgaged premises was ordered to satisfy the judgment debt with interest, costs, and expenses and costs of sale. On the date of the judgment also an order staying execution pending appeal was entered, providing, "that if defendants leave the money which is now in the hands of the clerk of this court, to be

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tendered and paid upon any judgment which may be rendered or sustained in said cause," and shall give a bond, as provided by law, in the sum of $250, execution shall be stayed pending the appeal. And it appears that a bond was given and approved, as provided in said order, on December 23, 1916.

When it appeared by the evidence that an error had been made in alleging the amount of interest due, plaintiff's counsel moved to amend the petition accordingly, and a motion to amend so as to correctly allege the amount of the interest had been filed on May 6, 1916. There does not appear to have been any order made upon either of these motions; but the court, no doubt, considered the petition as amended, without formal order to that effect, since the judgment included a greater amount of interest than the sum alleged; and when the motion to amend was renewed before the close of the testimony the court stated: "We will proceed. It can be done any time before judgment, or even after judgment."

The fact that $225 was tendered to plaintiff on March 28, 1916, seems to be admitted by the failure to file a reply denying the amount of such tender in the answer. But we think the evidence as to the tender is sufficient to show that said amount was tendered, and that it was intended to fully cover the amount claimed by the petition and summons with costs up to that time, except the attorney's fee claimed. And the fact that it was so intended was explained at the time and understood by the plaintiff, the defendant in error here. The latter testified as to the tender, in substance, that all that he claimed at the time, except for attorney's fees, was tendered, but he could not recall the amount, and that he refused it for the reason that it did not include attorney's fees. There was no evidence of the amount of the court costs at the time of the tender, probably for the reason that no contention was made that the tender was insufficient to cover the same in addition to principal, interest and insurance then claimed, and that the parties understood it to be sufficient for that purpose. But it appears to have been sufficient, exclud-

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ing the amount claimed for attorney's fees, for the judgment shows that up to the conclusion of the trial the costs were only $7.65. Thus the sum of $225 tendered exceeded the amount claimed by the petition and summons for principal, interest, insurance, and the court costs up to the time of the judgment, and it was also sufficient to include the interest to the time of the tender, though nothing seems to have been said about that at the time. But it was not sufficient and was not intended to cover any claim or allowance for an attorney's fee.

When the parties entered upon the trial, therefore, the only matter in controversy was the right to recover attorney's fees. And the only contention by plaintiffs in error here is that it was error to allow such fees; that contention being based upon the fact that the debtors were not notified of the assignment and no demand was made upon them before suit was brought, and the fact testified to by Mrs. Graves that after the debt was due and a short time before the assignment of the note and mortgage, Mr. Findlay told her that he did not need the money and that she need not worry about it at all. Mrs. Graves' testimony as to that matter, after stating that she had a conversation with Mr. Findlay after the note was due and shortly before suit was brought, is as follows: "I called him up on the phone and asked him if I should get this money for him. I told him I would borrow it for him. I told him Mr. Graves was out of work, payments were behind. * * * He said that he didn't need the money, and that I needn't worry myself in the least about it. Q. Did he tell you you could have all the time you needed to pay it? A. Yes. Q. Did he say he wouldn't urge you, or bring suit against you; give you to understand that? A. Yes, he just said I needn't worry in the least about it, he wasn't needing money. Q. Did you rely on that? A. I certainly did. Q. For that reason you didn't borrow money and pay it? A. No, but I did go and see about borrowing money. They told me if I needed money, Mr. Findlay pressed me, I could have it."

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This evidence does not show a definite extension of the time of payment, nor any consideration necessary to a valid and binding extension suspending the right to maintain an action upon the note or mortgage. (2 Jones on Mort., 7th ed., sec. 1190; 1 Wiltsie on Mort. Forcl., sec. 467.) And the debt being due and unpaid no previous demand was necessary to authorize a suit to recover the principal and interest due and to foreclose the mortgage to satisfy the same. (3 Jones on Mort., sec. 1471; 1 Wiltsie on Mort. Forcl., sec 49; Henry v. Hodge, 171 Ill. App. 10; Walter v. Dickson, 175 Pa. St. 204, 34 Atl. 646.) Nor, as a general rule, is a previous demand necessary to a recovery of attorney's fees provided for in the note or mortgage where the right to sue thereon has accrued. (Walter v. Dickson, *supra,* Warwick Iron Co. v. Morton, 148 Pa. St. 72, 23 Atl. 1065; Wienke v. Smith (Cal.), 176 Pac. 42.)

But, by the great weight of authority, a provision for attorney's fees in a note or mortgage is a contract of indemnity only—in the nature of a penalty as distinguished from liquidated damages—to compensate the payee or holder for an expense which he has necessarily incurred or become liable for, through some default of the maker or mortgagor; and such fees, even where there is a stipulation for the recovery of a certain or stated amount, are within the equitable control of the court, to allow only such sum as may be reasonable. (3 R. C. L. 896; 8 C. J. 1101; 27 Cyc., 1785-1786; 3 Jones on Mort., 7th ed., sec. 1606; Florence Oil & Ref. Co. v. Hiawatha Oil, G. & Ref. Co., 55 Colo. 378, 135 Pac. 454; Bank v. Coleman, 204 Fed. 24, 122 C. C. A. 338; Daly v. Maitland, 88 Pa. St. 384, 32 Am. Rep. 457; Coley v. Coley, 94 S. C. 386, 77 S. E. 49; Colley v. Summers P. Hdw. Co., 119 Va. 439, 89 S. E. 906, Ann. Cas. 1917D, 375; Triplett v. Sec. Nat. Bank, 121 Va. 189, 92 S. E. 897; Jarvis v. Stoffal, 54 Pa. Super. Ct. 362; Reed v. Catlin, 49 Wis. 686, 6 N. W. 326.) The general principle, under a provision for a certain amount, is well stated by Judge Gabbert in the Colorado case cited as follows:

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"We think the correct construction of such a stipulation, which has been announced in many cases, is that a provision for a fixed amount for attorney's fees is an agreement to indemnify the holder against the expenses incurred in the employing of an attorney for the enforcement of collection when the maker fails to keep his agreement, and that when the question is properly raised, regarding the reasonableness of a stipulated amount, the holder can only recover such part thereof as will reimburse him for the reasonable and necessary attorney's fees he has been compelled to pay or has become liable for in enforcing collection of the note."

And, in the exercise of such control and a sound discretion, such fees may be disallowed altogether, under circumstances rendering their recovery inequitable or unconscionable. (8 C. J. 1100, sec. 1434; Reed v. Catlin, *supra;* Williams v. Williams, 117 Wis. 125, 94 N. W. 25; Castle v. Castle, 78 Mich. 298, 44 N. W. 378; Lewis v. Germania Sav. Bank, 99 Pa. St. 86; Moore's App. 110 Pa. St. 433, 1 Atl. 593; Lindley v. Ross, 137 Pa. St. 629, 20 Atl. 944; Nat. S. F. & B. Ass'n v. Waters, 141 Pa. St. 498, 21 Atl. 666; Taylor v. King, 97 S. C. 477, 81 S. E. 172; Barron v. Thompson (S. C.), 97 S. E. 840; Scott v. Carl, 24 Pa. Super. Ct. 460; Haynes v. Halverton, 51 Tex. Civ. App. 228, 111 S. W. 166; Bank v. Coleman, *supra;* Fourth Nat. Bank v. Stahlman, 132 Tenn. 367, 178 S. W. 942; Enid C. Inv. Co. v. Porter, 45 Okla. 406, 145 Pac. 805.)

In Lewis v. Germania Savings Bank, *supra,* a defense was interposed that there had been an agreement extending the time for payment, and it was also claimed that because of the agreement to give further time the plaintiff was not entitled to recover attorney's fees. After stating that there was nothing substantial in the alleged agreement to give further time, for the reason that no sufficient consideration for such agreement was disclosed, the court referred to the objection to the recovery of attorney's fees as the only matter about which there could be any doubt, and stated the fact

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upon which the objection was based and the principle to be applied as follows:

"It is alleged by the plaintiff in error that prior to June 4th he called at the bank and offered to pay the interest falling due on that day, and also the principal debt, but was informed by the proper officer of the bank that 'they did not need the money, and to let it stand until the Butler county matter was disposed of,' etc., and that shortly afterwards, without making any request or demand for payment of principal or interest, suit was brought on the mortgage. It is contended that under the circumstances detailed in the affidavits of defense, as to the agreement to give further time, the plaintiff below was not entitled to recover attorney's commissions. We think this would be so if the defendant, even after suit was brought, had been reasonably prompt in paying, or tendering payment of the debt and interest secured by the mortgage. In Daly v. Maitland, 7 Norris (88 Pa. St.) 384, it is held that while stipulations for the payment of attorney's commissions in mortgages and other securities are valid, they are, nevertheless, subject to the equitable control of the court, and will be enforced only to the extent of compensating the plaintiff for reasonable and necessary expenses of collection. Applying this doctrine to the case of a debtor who has been misled by his creditor and thrown off his guard in the manner the plaintiff in error alleges he was, it would not be an unreasonable exercise of the equitable power of the court to refuse any allowance for attorney's commissions; but to justify such action on the part of the court, the defendant should attest his sincerity and good faith by promptly paying or tendering the amount of debt and interest, exclusive of commissions."

And because there had not been a tender in that case of the amount of the debt and interest, but the defendant undertook to defend against a part of the plaintiff's claim, and failed to pay or tender the residue, it was held that he was not entitled to equitable relief from the stipulation for attorney's commissions. In Moore's Appeal, *supra,* judgment had been entered upon a judgment note before it fell due

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and the plaintiff, upon the maturity of the note, refused a tender of the full amount due, excluding attorney's commissions. While the case is not in point on the facts, it is important because of a reference in the opinion to a former case apparently not published in the official reports. The court said:

"To permit such a practice as this, where the defendant offers to pay all that is due at the maturity of the obligation, would be sanctioning an intolerable and unreasonable oppression. * * * We said in Imler v. Imler, 13 Norris, on p. 375: 'It was never intended, nor can we permit such a clause to be used to compel a debtor to pay attorney's commissions where the latter does not dispute the claim and pays at maturity.' In Johnson v. Marsh, 42 Leg. Int., 92, we refused to allow commissions even after execution issued, because there was no satisfactory evidence of a demand for payment before entering judgment, although the debt had passed maturity." It was explained in Imler v. Imler, that the intention of stipulations for attorney's fees in instruments for the payment of money is that the creditor shall be indemnified for his reasonable counsel fees, where it becomes necessary to employ counsel to collect the money.

In a later case in the same court, Lindley v. Rose, *supra*, where the fees were disallowed, it appeared that there had been some negotiation between the parties for making a partial payment before the entry of judgment authorized by the note, and the defendants claimed that the plaintiff had agreed when the money was borrowed that judgment should not be entered until they had notice and an opportunity to pay, if payment was required. Whether the fact of such agreement was established or not does not clearly appear; but the trial court held that demand was necessary before entry of judgment to authorize a recovery of the commissions, and that conclusion, upon the facts of the case, was sustained by the Supreme Court, that court saying: "We think the learned judge below was right in holding, under the facts in this case, that there must be a demand and refusal to pay, before the defendants in the judgment can be

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subjected to the payment of attorney's commissions. This was the rule laid down in Johnson v. Marsh, 21 W. N. 570, where it was said: 'In the absence of satisfactory evidence of a demand for payment before entering the judgment and issuing the execution, we think the necessity of resorting to the services of an attorney for collecting the money does not appear, and, without proof of such necessity, the defendants ought not to be subjected to the payment of the commissions'."

In National S. F. & B. Ass'n v. Waters, *supra,* it appeared that the mortgage debtor, upon receiving information that the mortgage was due, and that payment had been demanded, requested a statement of the amount due, and was given such a statement concluding with the words, "Good only until September 11, 1890"; and that relying upon said words the debtor, on the date stated, paid the amount of the debt, with interest, taking a receipt therefor reciting that the costs were to be adjudicated between the parties. It was held that the trial court properly entered judgment for the office costs only, excluding attorney's commissions, the court saying: "The services of the latter were not needed for the collection of the money. Indeed, no object is apparent for issuing the *scire facias* upon the mortgage, except to create a plausible pretext for a charge of attorney's commissions. Under the statement furnished by the plaintiff company to the defendants, on August 30th, the latter were entitled, under any fair and reasonable construction thereof, to pay the money at any time on or before September 11th. The issuing of a *scire facias* between those dates, so far as we can gather from the record, was unnecessary, as well as a breach of faith. It certainly does not entitle the plaintiff to claim an attorney's commission."

The facts in the Wisconsin case of Williams v. Williams, *supra,* were that the action to foreclose a mortgage was commenced on January 29, 1902, and on the following day the defendant deposited in court an amount sufficient to pay the amount demanded, excluding costs and solicitor's fee, and moved to dismiss without costs, alleging that on Jan-

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uary 28th the mortgage was recorded in the name of and belonged to the plaintiff's attorney, on which day defendant's attorney offered to pay the same to said holder, and upon it appearing that the latter was attempting to evade a payment, defendant tendered the full amount of the mortgage with interest, which the said holder absolutely refused to receive, or to receive any sum whatever in payment, that said holder then immediately transferred the mortgage to plaintiff and brought suit upon it. It was asserted also in support of the motion to dismiss that the refusal of payment when tendered, and the immediate commencement of the suit was intended to harass and distress the defendant, and impose unnecessary costs and expenses. The amount deposited in court was ordered to be paid to plaintiff in full of the amount due on the mortgage, and the cause was dismissed without costs to either party. That action of the trial court was affirmed on appeal, the Supreme Court saying:

"The record, however, presents no attempt to set up the previous tender of the mortgage debt as a defense to the action, but merely an appeal to the court to dismiss the action because continuance of the litigation would be wholly needless; the defendants having performed all that plaintiff sought to enforce by her suit, namely, paid the full amount demanded by the complaint. That courts have inherent power to protect themselves against fictitious and futile litigation is unquestionable. (Citing cases.) * * * Appellant further urges, however, that she was entitled to the costs already incurred; and, since the deposit of money and motion to dismiss were predicated upon assumption that she was within her strict right in commencing action, that contention might be unanswerable in action at law, where costs are matter of strict statutory right. This, however, is a suit in equity, wherein allowance of costs is discretionary, at least upon dismissal. * * * In the present case we are satisfied that the conduct of plaintiff and her attorney was such as to fully justify the withholding of costs from her. Confessedly, the amount due upon the mortgage was

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offered her attorney before suit, when he apparently owned it; and he was notified that pay was ready at any time, whether a legal tender was made or not. His only excuse for nonacceptance was that he was engaged in preparing a lengthy bill of exceptions and could not spare the time to look up the mortgage; yet he did take time immediately not only to find it, but to formally transfer it to plaintiff, and to prepare the voluminous complaint and other papers necessary for commencing this foreclosure action, which he caused to be served with all haste, instead of notifying defendants' attorney that he would accept payment. The only motive conceivable for such conduct is not one which commends itself to courts of equity or invites their favors."

It appeared in the Texas case cited, Hayes v. Halverton, which was a suit upon vendor's lien notes, that the defendant had gone to plaintiff's office to pay before suit was brought but found that the latter was out of the state, that he then went to the office of another party, understanding that the latter was collecting money for the plaintiff, who told the defendant that he did not have the notes for collection or in his possession and knew nothing about them; and defendant testified that he had been ready and willing to pay the notes when presented, but did not learn of the plaintiff's return until the suit was commenced, and that on the next day he went to the plaintiff offering to pay the notes and interest, but the same was refused unless attorney's fees were also paid; the plaintiff also telling the defendant that he had sued him without giving him notice for the reason that the defendant had testified against him in a certain suit. On appearance day the defendant again tendered the principal and interest. It was held that the recovery of the stipulated attorney's fees was properly denied.

In the South Carolina case of Barron v. Thompson, *supra*, it appeared that a second note and mortgage had been executed and delivered to take the place of a note and mortgage previously executed, but the receivers of the payee corporation, finding the first note and mortgage among the papers of the corporation, brought suit to foreclose that

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mortgage, and, upon being apprised of the fact that a second note and mortgage had been given to take it up, agreed to, and did, deliver up the first for cancellation, so as to permit another loan to be made to pay off the second according to an arrangement made with the bank to which said second note and mortgage had been assigned. But shortly after that the receivers and their attorney paid said note and mortgage off at the bank with receivership funds, and then refused to accept payment from the defendant unless he would pay attorney's fees. Defendant refusing to pay such fees tendered the amount due in full settlement, which was refused, and foreclosure proceedings were brought on the note and mortgage so acquired by the receivers. The amount of the tender was then paid into court. It was held upon such facts that there was no necessity for the suit and that plaintiffs were not entitled to attorney's fees.

Now, in the case at bar, it is clear that Mrs. Graves was lulled into a sense of security by Mr. Findlay's stating to her, when she was proposing to borrow the money to pay the debt, that he was not needing the money and she need not worry about it at all; and that her inaction in the matter beyond ascertaining that she could obtain the money if needed was caused thereby. And we think she had a right to believe from what Findlay said that no suit would be brought or legal proceedings taken to collect the note or foreclose the mortgage without further notice giving an opportunity for payment. Had Findlay remained the owner of the note and mortgage and brought the suit when it was brought, without previous demand or notice, it would certainly have been a breach of faith on his part. And as the mortgage is not a negotiable instrument and the note was overdue when purchased by the plaintiff, the latter took them subject to all equities existing at the time of the assignment, if not indeed at the time the defendants thereafter learned of the assignment. (Castle v. Castle, 78 Mich. 298, 44 N. W. 378.)

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But it further appears that the recovery of this debt was not the sole object of the suit, for as shown by the plaintiff's testimony it was brought to compel a settlement also of another matter between the plaintiff and Mr. Graves. Explaining his purpose in buying the note and mortgage and bringing suit, the plaintiff testified that he had a note against Mr. Graves upon which he had secured a judgment; that Graves had filed a petition in bankruptcy to evade that note; that on the basis of certain statements of Graves to the referee in bankruptcy "we claimed an interest on this property, and so I, in order to eliminate any one else having an interest in the property except me and the people that own it, I bought that note and mortgage, so that when it came to any proceedings in the matter there would be no one else it would be necessary to call upon at all"; that it was done so that he might be in a position to know the interest of Mr. Graves in this property and how he acquired that interest. And he testified directly that the note was bought to compel a settlement of the other matter, and that the suit was brought to compel a settlement of both matters. He testified also that after the suit was brought he had a conversation with defendants in which he proposed a settlement of both matters, and on his own responsibility, but without authority of his attorney, told them that if both matters were settled as proposed the total attorney's fees would be only $50.00.

The note and mortgage are signed by both Mr. and Mrs. Graves, but the latter's name is first signed to both, and the parties executing the mortgage are described therein as follows: "Cora V. Graves, and Karl DeF. Graves, her husband," seeming to indicate that Mrs. Graves is the principal debtor and at least the record owner of the property.

A sufficient amount having been promptly tendered after suit was brought to cover all that was claimed by the petition and summons and the costs and interest up to the time of the tender, excluding attorney's fees, and the tender having been kept good by a deposit of the amount with the clerk of the court, we are of the opinion that the allowance of any

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amount for attorney's fees is inequitable, and that it was error to include any amount therefor in the judgment. The defendants did not then know of the mistake in the amount of the interest due, but relied upon the averment of the petition as to the amount. The computation of interest because of the many monthly payments, some of which were not made promptly, was a complicated matter, and the mistake shown by the evidence was not chargeable to the defendants. Mrs. Graves testified that she had been informed before suit at or about the time of her conversation with Mr. Findlay that the balance of principal due was $171.00 or $174.00, but that she did not know the amount of the interest. When it appeared that a mistake had been made an additional amount supposed to be sufficient to cover the difference was tendered and also deposited with the clerk. That tender and deposit seems to have lacked twenty-one cents to make it cover the exact amount of the difference, for the amount shown to have been due of principal and interest, upon curing the mistake in interest, was $237.21, but that it was not sufficient does not appear to have been suggested upon the trial. By the judgment interest was allowed upon the entire amount due at the commencement of the action to the date of judgment. The defendants should not be required to pay interest upon the amount originally tendered and deposited in court, viz: $225.00.

The cause will be remanded with directions to modify the judgment by excluding the amount of the attorney's fees allowed thereby, and that portion of the interest allowed from the commencement of the action equalling the interest upon the sum of $225.00, the amount of the original tender.

BEARD, C. J., concurs.

BLYDENBURGH, J., being ill, did not participate in the decision.

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BUDD v. ROY.

(No. 945; Decided June 4th, 1919; 181 Pac. 140.)

APPEAL AND ERROR—RECORD—FILING—BRIEFS—DISMISSAL.

1. Where judgment was rendered January 30th, filed January 31st without any showing as to when it was entered, and the record, including the specifications of error filed April 4th, was certified to by the clerk of the district court on the following day, and by the district judge on April 9th, and filed in the Supreme Court on April 26th, the appeal cannot be dismissed on the ground that the record was not filed within time, the statute providing that if the district judge fails to grant a new trial within 20 days from the filing of specifications of error, the clerk of the district court shall transmit the record to the clerk of the Supreme Court, etc.
2. Where the record was filed in the Supreme Court April 25th, but appellant failed to file briefs within the 60 days required, and no action was taken upon an application for extension of time, the appeal will be dismissed for want of briefs; no briefs having been filed before the filing of motion to dismiss.

APPEAL from District Court, Lincoln County, HON. V. J. TIDBALL, Judge.

Action by Charles P. Budd against Sarah Roy. Judgment for plaintiff and defendant appeals. Heard on motion to dismiss. No briefs.

Ivan S. Jones and *R. R. Rose,* for plaintiff and respondent.

Reuel Walton and *P. W. Spaulding,* for defendant and appellant.

PER CURIAM.

This case was brought to this court by direct appeal and has been submitted on motion to dismiss the appeal, filed March 5, 1919, the motion stating two grounds: 1. That the record on appeal was not filed in this court within the time required by law. 2. That no brief has been filed by the appellant and the time therefor has expired. There is no merit in the first ground, for it appears that the judg-

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ment was rendered on the 30th day of January, 1918, and filed January 31, 1918, without any showing, however, as to the date when it was entered, and the record, including the specifications of error filed April 4, 1918, was certified to by the clerk of the district court on April 5, 1918, and by the district judge on April 9, 1918, and the record was filed in this court on April 25, 1918. The statute provides that if the district judge shall fail to grant a new trial within twenty days from the date of filing the specifications of error the clerk of the district court shall thereupon transmit the record to the clerk of this court with the specifications of error. The record was, therefore, promptly filed in this court, and even earlier than required. And it is at least doubtful if a delay of the clerk in transmitting the record to this court would be ground for dismissal. We are not prepared to hold that it would.

But the motion must be sustained on the ground of the failure of the appellant to file briefs. The record having been filed in this court on April 25, 1918, the briefs of appellant should have been filed and served within sixty days thereafter unless within that period the time therefor was duly extended. Such time was not extended. An application for such extension was filed in this court on October 3, 1918, long after the time for filing the briefs had expired, but no action was taken upon such application, evidently for the reason that the time had expired before the filing or presentation of the application. And no briefs have since been filed. For the reasons stated an order will be entered dismissing the appeal.

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MORGAN v. STATE.

(No. 936; Decided June 16th, 1919; 181 Pac. 598.)

BILL OF EXCEPTIONS—CRIMINAL LAW—EXTENSION OF TIME FOR PREPARING BILL OF EXCEPTIONS—NEW TRIAL—BILL OF EXCEPTIONS.

1. Under Laws, 1917, c. 70, sec. 1, authorizing trial court within 60 days from its decision to extend time for filing bills of exception, an extension order made after the 60 day period is void.
2. Alleged error in overruling a new trial motion can be reviewed only when the motion is included in the bill of exceptions.

ERROR to District Court, Crook County, HON. E. C. RAYMOND, Judge.

Proceedings between the State of Wyoming and James R. Morgan. From an adverse judgment, Morgan brings error. Heard on motion to dismiss proceedings in error.

Metz & Sackett, for plaintiff in error.

D. A. Preston, former Attorney General, *W. L. Walls,* Attorney General, and *T. Paul Wilcox,* Deputy Attorney General, for the State.

PER CURIAM.

In this case a motion of the defendant in error to strike the bill of exceptions from the record and to dismiss the proceedings in error has been submitted. The ground of the motion is that the bill of exceptions was not presented to the court or judge for allowance, or allowed within the time required by law. The judgment was rendered October 8, 1917, the motion for a new trial was denied November 20, 1917, and the bill of exceptions was presented for allowance and allowed February 27, 1918. On February 15, 1918, an order was filed giving the plaintiff in error (defendant below) until February 28, 1918, to present the bill for allowance. No other order was made granting an extension of time for the presentation of the bill. Section 4595, Comp. Stat. 1910, as amended and re-enacted by Section 1, Chapter 70, Session Laws 1917, provides as follows:

"The party objecting to the decision must except at the time the decision is made, and shall have sixty days from

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and after the date of the judgment, decree, or final order in the case within which to reduce the exception to writing and present the same to the court or judge for allowance. If within said sixty days the party excepting shall make it satisfactorily to appear to the court or judge authorized to allow the bill of exceptions that the party will be unavoidably prevented from presenting the bill within said time, the court or judge by written order may extend said time, but not to exceed sixty additional days."

In this case the bill of exceptions was not presented for allowance until ninety-nine days after the motion for a new trial was denied. No order for an extension of time for the presentation of the bill was procured until eighty-seven days after the denial of the motion for a new trial. By the statute the party excepting has sixty days after the date of the final order, which in this case was the date of the denial of the motion for a new trial, within which to present his bill of exceptions. He has that time as a matter of right, and without any order of the court or judge. The court or judge is authorized to grant further time, not exceeding sixty additional days, by written order made within the sixty days allowed by the statute in all cases, upon a satisfactory showing that the party will be unavoidably prevented from presenting the bill within sixty days from the date of the final order. In the case at bar the order giving further time for the presentation of the bill was not made until eighty-seven days after the ruling on the motion for a new trial and was ineffectual to extend the time. The bill of exceptions not having been presented for allowance within the time required by the statute must be stricken from the record; and as the only error assigned in the petition in error is the overruling of the motion for a new trial, which motion must be included in the bill of exceptions and cannot otherwise be presented to this court for review, and the bill being stricken from the record, nothing remains for this court to consider. It follows that the proceedings in error must be dismissed, and it is so ordered. *Dismissed.*

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CULBERTSON v. AINSWORTH.

(No. 952; Decided June 16th, 1919; 181 Pac. 418.)

APPEAL AND ERROR—DIRECT APPEAL—SERVICE AND FILING OF NOTICE AND APPEAL—TIME FOR SERVICE—NOTICE—SERVICE AFTER JUDGMENT—WAIVER.

1. The fact of service of notice of appeal and the filing thereof within ten days from entry of judgment must appear from the record to confer appellate jurisdiction under Laws, 1917, Chapter 32, Section 2; service of notice prior to entry of judgment is insufficient.
2. A notice of appeal dated prior to, but filed after entry and filing of judgment without date of service endorsed thereon is insufficient under the Statute, and affidavits showing service prior to entry of judgment will not be considered.
3. Where notice of appeal was dated prior to entry and filing of judgment and the endorsement acknowledging service appearing upon such notice was undated, no presumption arises from the record that the notice was served within 10 days after entry of judgment, as required by the Statute, though notice of appeal was filed after such entry of judgment.
4. The direct appeal statute, Laws, 1917, Chapter 32, Section 2, does not authorize a waiver of service of appeal and a waiver by stipulation of the parties of service of notice of appeal is not competent since appellate jurisdiction cannot be conferred by consent. The direct appeal statute contains no provision authorizing a waiver of service of notice of appeal, such as is provided by Comp. Stat., 1910, Sections 5111 and 5112, authorizing a waiver of the issuance or service of a summons in error.

APPEAL from District Court, Washakie County, HON. JAMES H. BURGESS, Judge.

Action by Roger Culbertson, administrator of the estate of William D. Albee, deceased, against Frank S. Ainsworth, et al. From a judgment for defendants, plaintiff appeals. Heard on motion to dismiss the appeal.

E. E. Enterline, for respondent in support of the motion.

The notice of appeal was served two days before the judgment was entered; this was insufficient to confer appellate jurisdiction. (Hahn v. Bank (Wyo.), 171 Pac. 889; Goodrich v. Bank, 177 Pac. 134.)

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R. B. West, for plaintiff and appellant.

E. E. Enterline, for defendants and respondents.

PER CURIAM.

This case is here on direct appeal and a motion has been submitted to dismiss the appeal. The only ground stated in the motion which we think necessary to consider is that the notice of appeal was given prior to the filing and entry of the judgment appealed from.

The record was filed in this court on July 27, 1918, and the motion to dismiss was filed on September 30, 1918, and submitted on October 17, 1918. It appears from the record that the cause was tried in the district court on March 22, 1918, and that at the close of the evidence on that day the court announced that the judgment would be for the defendants. That a judgment order in favor of the defendants containing also the findings was signed by the district judge who tried the cause under the date of March 23, 1918, and as done in open court on that day, and was filed and entered on March 29, 1918; that the notice of appeal, dated March 25, 1918, and stating in substance that the plaintiff appealed from the judgment rendered on March 23, 1918, and certain specified portions of the findings, was filed with the clerk of the district court on March 30, 1918; and that there was endorsed upon said notice as filed the following undated acknowledgment of service signed by the attorney for the defendants: "Copy of notice received and further service thereof waived." The record contains no other proof of service of the notice.

The statute under which the appeal is taken provides: "An appeal must be taken by serving a notice in writing to such effect, signed by the appellant, or his attorney, upon the opposing party, or his attorney, within ten days from the entry of the order or judgment appealed from, and said notice of appeal shall be filed with the Clerk of the District Court where the order or judgment appealed from is entered, within said ten days." (Ch. 32, Sec. 2, Laws 1917.) It was held in Hahn v. Citizens' State Bank, 25 Wyo. 467,

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171 Pac. 889, 172 Pac. 705, that a notice of appeal served and filed before the judgment appealed from was entered was premature and ineffective to bring the case here for review under the statute aforesaid.

The filing of the notice in this case was not premature, for it was filed after the judgment was entered—the day following such entry. But the service of the notice within the time prescribed therefor after the entry of the judgment or order appealed from is also essential to give this court jurisdiction, if, indeed, service of the notice is not the principal act required to be done within the prescribed time in taking the appeal. The language of the statute is that an appeal must be taken by serving a notice in writing to such effect, etc., and, that "said notice" shall be filed within said ten days. Clearly, therefore, the notice must be served within ten days from the entry of the judgment, and the fact of such service within that time must be shown by the record to give this court jurisdiction. (4 C. J., p. 39, sec. 1612, p. 41, sec. 1616; 2 Standard Ency. Proc., pp. 318, 346; 2 Ency. Pl. & Pr. 230.) This necessarily requires the filing of proof of service with the clerk of the district court and the incorporation thereof in the record, although an acceptance or acknowledgment of service properly signed written or endorsed upon the notice as filed and showing the date of service will be sufficient as proof of such service.

But unfortunately the written acknowledgment of the service of the notice in this case is not dated, and there is nothing in the record to show when the service thus acknowledged was accepted or made. The respondents, by affidavits attached to the motion to dismiss, show that the original notice was received by their attorney on March 26, 1918, and that service thereof was accepted by the endorsement aforesaid thereon on March 27, 1918. But we doubt our right to consider such affidavits filed in this court. In Hahn v. Bank, *supra,* we said with reference to affidavits filed here to show the fact of the entry of the judgment or order appealed from and the date of such entry, that this court, in its consideration of the case, is confined to the record on

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appeal, and that we did not think it competent to show merely by affidavits filed in this court the fact that the judgment or order appealed from was or was not entered or when the entry thereof was made, thereby contradicting or supplying a deficiency in the record in that respect, but that affidavits might, no doubt, be proper in support of a motion to return the record for correction, or to afford an opportunity for its correction or amendment in the district court. (And see Wright v. Ross, 26 Cal. 262; Bonds v. Hickman, 29 Cal. 460.)

Upon the record, therefore, it does not appear that the notice was served after and not before the entry of the judgment, unless it may be presumed from the facts appearing by the record that it was so served, or unless it is competent to waive service of the notice by stipulation. And we do not think the presumption legally or properly follows from the facts in the record that the notice was served within the time prescribed by the statute, though no doubt it might be presumed that it was served prior to the time the notice was filed and either before or on the date of such filing, from the fact that as filed the notice bears the endorsement acknowledging service as aforesaid. But that filing occurred on the next day after the entry of the judgment, and the notice is dated on March 25, 1918, four days before the judgment was entered, making it possible for the notice to have been served prior to such entry. Nor do we think it competenet to waive the service of notice of appeal, for jurisdiction of the cause on appeal cannot be conferred on this court by consent. (In re. Gold Street v. Newton, 2 Dak. 39, 3 N. W. 311, 8 N. W. 139; Oliver v. Harvey, 5 Ore. 360; Wolf v. Smith, 6 Ore. 73; Wright v. Ross, 26 Cal. 262; Bonds v. Hickman, 29 Cal. 460.) The statute of California provided that an appeal shall be taken by filing with the clerk a notice of appeal, and serving a copy thereof upon the adverse party or his attorney. The court said that the filing of the notice of the appeal is indispensable to enable the appellate court to obtain jurisdiction of the cause, and that a waiver of the filing by the stipulation of the

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parties is not the equivalent of filing the notice, "for consent, though it may waive error, cannot confer jurisdiction." (Bonds v. Hickman, *supra.*) The Oregon statute provided that the appellant shall cause a notice to be served on the adverse party, and file the original with proof of service indorsed thereon with the clerk, and that an appeal shall be taken and perfected in the manner prescribed and not otherwise. In Oliver v. Harvey, *supra,* it was held that the service and filing of the notice of appeal was indispensable in order to enable the appellate court to obtain jurisdiction of the cause, and that the parties could not waive the filing of the notice, since consent cannot confer jurisdiction. We refer specifically to these cases for the reason that the statutes considered were quite similar to our own. If it would be competent to waive service of the notice, or if such a waiver should be permitted by statute, we think the waiver of further service included in the endorsed acknowledgment of service upon the notice would amount to such a waiver. But, unlike the statutory provisions providing for bringing causes to this court by a proceeding in error which, while requiring the issuance and service of a summons in error, provide that the defendant in error, or his attorney, may waive, in writing, the issue or service of the summons (Comp. Stat. 1910, secs. 5111, 5112), the direct appeal statute contains no provision authorizing a waiver of the service of the notice of appeal.

We are forced to conclude, therefore, that the record in this case fails to show a service of the notice within the time prescribed by the statute. If we were to consider the affidavits attached to the motion showing the date of service, it would appear that the notice was in fact served prior to the entry of the judgment, and no counter affidavits have been filed. But, doubting our right to consider affidavits filed only in this court showing the fact as to the date of service, we think it better to dispose of the matter upon the showing made by the record. It follows that the motion must be sustained and the appeal dismissed, and it will be so ordered.

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MERRILL, ET AL. v. ROCKY MOUNTAIN CATTLE CO. ET AL.

(No. 898; Decided June 23rd, 1918; 181 Pac. 964.)

VENDOR AND PURCHASER—SUFFICIENCY OF TITLE—REAL ESTATE—SUBMISSION TO ARBITERS—CORPORATION AGREEMENT WITH STOCKHOLDERS—CONTRACT—TIME THE ESSENCE OF—AGREEMENT TO CONVEY PUBLIC LANDS—ISSUANCE OF PATENT—CONSTRUCTION OF CONTRACT—"MUNIMENTS OF TITLE"—SPECIFIC PERFORMANCE—LAND CONTRACT—MUTUALITY—CHANGE IN VALUE OF PROPERTY.

1. Where vendors agreed to convey all lands to which it secured good title during a two-year period and at the expiration of the period to submit muniments of title to named arbiters for determination as to sufficiency of its title to lands not theretofore conveyed, they were not required, upon expiration of the period, to tender the deed to land for which they had only such muniments of title possessed at date of contract, and were not bound to submit such muniments of title to arbiters; purchasers having been dissatisfied therewith at date of contract.
2. Where a corporation, having arranged to distribute the assets to its stockholders according to their respective interests, agreed to convey to certain stockholders such lands as it could perfect its title to during two-year period, and gave the stockholders possession thereof during such period, time was of the essence of the contract.
3. Vendor being owner of forest lieu scrip in the name of another, giving it the right to select, enter, and patent in the name of such other party, vacant public lands, and having agreed to convey such lands to which it is able to obtain title during a certain period, was not bound to convey land patented during period, where the land was not conveyed to vendor by grantee named in patent within period.
4. Title passes to grantee named in patent to United States vacant public land on date that patent is issued and recorded in proper office at Washington.
5. A contract, requiring vendor to convey lands to which it obtains title during certain period and to submit to arbiters at expiration of period such "muniments of title as it or its agents or trustees then possess or possesses," construed to provide for submission to arbiters of documentary evidence of title in actual possession and control of vendor, as distinguished from constructive possession, at the expiration of period.

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6. If a land contract be construed as obligating vendors to sell after a certain date and does not obligate purchasers to accept land after such date, it is lacking in mutuality and will not be specifically enforced.
7. Where purchasers, knowing that vendors had obtained title to land they had agreed to convey upon obtaining title within a certain period, and knowing of prospective increase in value because of discovery of oil wells on other lands, did not sue for specific performance until after tests had been made and the land found to produce oil, they will be estopped from asserting their right to specific performance at such time.
8. Specific performance of a land contract is not decreed as a matter of course, but is granted or withheld according as equity and justice seem to demand in view of all the circumstances of the case.

ERROR to District Court, Hot Springs County, HON. E. C. RAYMOND, Judge.

Action by George Merrill, et al., against the Rocky Mountain Cattle Company, et al., for specific performance of contract for the sale of real estate. Judgment for defendants and plaintiffs bring error. Other material facts are stated in the opinion.

C. A. Zaring and *Frank Pierce*, for plaintiff in error

The contention that the execution of a bond by plaintiff in error was a condition precedent to full performance by defendant in error is without merit for the reason that the bond was waived; but this provision was not a condition precedent. (Raley v. Umatilla County, 15 Ore. 172, 3 A. S. R. 142; 2 Devlin on Deeds, Sec. 964 (2 Ed.); 2 Washburn on Real Property (5 Ed.), p. 3, sec. 2.) Stipulations are not to be construed as conditions precedent unless made necessary by the terms of the contract. (Deacon v. Blodgett, 111 Cal. 416 (see 70 A. S. R. 832, notes); 9 Cyc. 588; Waterman on Specific Performance, sec. 435.) Waiver may be shown by circumstances. (40 Cyc. 267.) Waiver operates as estoppel. (Bigelow on Estoppel (6 Ed.), 717; 10 R. C. L. 694; Wilmore v. Stetler, 137 Ind. 127, 45 A. S. R. 169 and note; 16 Cyc. 791, 792; Louisville Ry. Co. v. Flanagan, 113 Ind. 488, 3 A. S. R. 674, 678.) One cannot

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appropriate benefits and disavow burdens arising on contract. (Blackwell v. Kercheval, 27 Idaho 537, 149 Pac. 1060; Miller v. Hare, 43 W. Va. 647, 39 L. R. A. 491; Lane v. P. I. N. Ry., 8 Idaho 230, 67 Pac. 656.) Equity will not countenance inconsistent positions; defendants first relied solely on the time limit. They cannot now change their base. (Railway Co. v. McCarthy, 96 U. S. 267; Germania Fire Ins. Co. v. Pitcher, 160 Ind. 392, 64 N. E. 921; Bigelow on Estoppel (6 Ed.), 744-745; Davis v. Wakelee, 156 U. S. 690; McDonough v. Co., 112 Fed. 636; Stanton v. Barnes, 72 Kan. 544, 84 Pac. 117.) The case of Frank v. Stratford-Handcock, 13 Wyo. 37, is unlike the present case, as will appear from an examination of the pleadings and facts. The title to Parcel 3 vested in defendants May 7th, 1914, two days before the expiration of the contract, title passes by the signing of a United States patent. (United States v. Schurz, 102 U. S. 378.) Title of the assignee of forest scrip relates back upon the issuance of the patent to the time of entry. (Frank F. McCain, 34 L. D. 126; Kern Oil Co. v. Clarke, 30 L. D. 550; French v. Spencer, 21 Howard 228.) The principle is supported by numerous other authorities. When a contract has been partly executed by possession taken under it, the court will enforce performance, if possible. (Fry Spec. Per. 335; Pomeroy Spec. Per. 96.) No reliance should be placed upon the discovery of mineral subsequent to the contract. Inadequacy of price that will defeat specific performance must exist at the time the contract was made. (Hale v. Wilkinson, 21 Gratt. 75.) Increase in value after date of contract is not ground for refusing specific performance. (Low v. Treadwell, 12 Me. 441; Cady v. Gale, 5 W. Va. 547; Willard v. Tayloe, 8 Wall. 557; Meehan v. Nelson, 137 Fed. 731; Am. Ann. Cas. 1912, C. 560.) While the granting of specific performance is discretionary, it will ordinarily be granted as a matter of course, where the contract is in writing, certain in terms based on valuable consideration, fair and just and capable of being enforced without hardship to either party. (4 Pom. Eq. 1404.) The court erred in

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granting the motion of the Ohio Oil Company for non-suit. It should have been kept in the case pending settlement of the controversy between the other parties. (Frank v. Stratford-Handcock, 13 Wyo. 37.)

Edward T. Clark, Herbert V. Lacey and *John W. Lacey*, for defendants in error.

The memorandum opinion of the trial court is not material to this inquiry. (Little v. Co., 100 S. W. 561; Holland v. Ry. Co., 101 N. W. 608; Martin v. Martin, 67 N. E. 1; Morgan v. Co., 107 Pac. 695; Randall v. Co., 43 N. E. 540.) There was a separate contract for each parcel of land and each admitted of separate execution in the matter of a separate agreement. (Perkins v. Hart, 11 Wheaton (24 U. S.), 237, 250; Small v. Co., 20 Fed. 753; Myers v. Croswell, 45 O. S. 543; Wooton v. Walters, 14 S. E. 734; McGrath v. Cannon, 57 N. W. 150.) The contract as to Parcel 3 expired not later than May 13th, 1914, removing any possible right to specific performance. Plaintiffs failed to perform an election to furnish a stipulated bond; under the facts there was no waiver of this requirement. (Rice v. Deposit Co. (8th Cir.), 43 C. C. A. 270.) A waiver in law is the intentional relinquishment of a known right. (Aronson v. Ins. Co., 99 Pac. 537.) There must be acts of relinquishment amounting to an estoppel. (Bank v. Maxwell, 55 Pac. 980; Perin v. Parker, 18 N. E. 747; Holdsworth v. Tucker, 143 Mass. 369; Berman v. Assc., 78 Atl. 462; List v. Chaise, 88 N. E. 120.) No estoppel is pleaded and the point is not available. (Nebraska Co. v. Blust, 60 N. W. 1016; Homberger v. Alexander, 40 Pac. 260; Union Co. v. Bank, 72 Pac. 586.) But no estoppel was proven. (Norton v. Kearney, 10 Wis. 1043.) There was no evidence that plaintiff accepted benefits; there was no possession and no improvements made by plaintiff. The doctrine of relation as to the passing of land titles has no application here. Equity will not aid plaintiffs in error, since it is clear that they are seeking to open a contract which on their agreement had been closed, and this for the purpose of profiting by oil discoveries. (Whitney v. Fox, 166 U. S. 637; Turn-

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lick v. Marbury, 91 U. S. 587; Johnson v. Standard Co., 148 U. S. 360; Patterson v. Hewitt, 195 U. S. 309.) The decree of the court below should be affirmed.

POTTER, JUSTICE.

This is an action for specific performance wherein, as the case is presented here, the plaintiffs are seeking a decree requiring execution and delivery to them of a good and sufficient deed conveying a tract of land containing approximately forty acres and described as Lot Two (2) of Section Nineteen (19) in Township Forty-six (46) North of Range Ninety-eight (98), West of the 6th Principal Meridian, in this state. Upon a trial in the District Court, judgment was rendered upon a general finding in favor of the defendants, and the case is here on error.

As the plaintiffs in error were plaintiffs below and the defendants in error defendants below, they will be referred to respectively as plaintiffs and defendants, when not mentioned by name, but a reference to the defendants collectively will include only the Rocky Mountain Cattle Company and L. G. Phelps, against whom only a decree for specific performance is sought. The plaintiffs are George Merrill, H. J. Guthrie Nicholson, and George Pennoyer.

The contract upon which the action is based is in writing and set out in full in the amended petition upon which the action was tried, and the material parts thereof are as follows:

"This Agreement Made and entered into in triplicate this 9th day of May A. D. 1912 by and between Rocky Mountain Cattle Company, a corporation, duly organized and existing under the laws of the State of Wyoming, by L. G. Phelps, its President, duly authorized, party of the first part, and George Merrill, G. J. Guthrie Nicholson and George A. Pennoyer, of Embar, Big Horn County, Wyoming, parties of the second part, and L. G. Phelps, witnesseth:

"That Whereas, Under the terms of a certain contract made and entered into by certain of the stockholders of the

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Rocky Mountain Cattle Company on the 13th day of August 1910 wherein it was agreed by the said stockholders that the assets of the Company should be distributed upon terms therein designated, which said contract was duly ratified at a regular meeting of the stockholders of the said Company at the office of the Company on August 13th, 1910, and,

"Whereas, Under the terms of the said contract there was no time limit placed upon the acquisition of titles to certain lands then initiated, which said lands were subsequently conveyed by warranty deed to George Merrill, G. J. Guthrie Nicholson and George A. Pennoyer under the terms of the contract aforesaid, and

"Whereas, The parties hereto have agreed that title to the following lands included in the lands described in the warranty deed aforesaid, viz: (describing several tracts of land, containing a total of 1040 acres, and including the 40 acre tract aforesaid) which were initiated at the date of the contract aforesaid, so entered into, should not have been included in the Warranty Deed aforesaid, title not having inured to the Rocky Mountain Cattle Company.

"Now, Therefore, for and in consideration of the payment of the sum of Twenty Thousand Eight Hundred ($20,800.00) Dollars to them in hand paid, the receipt whereof is hereby acknowledged, the parties of the second part herein do hereby agree to execute and deliver to the party of the first part herein a quit-claim deed to all of the property hereinbefore enumerated, and the party of the first part herein agrees that it will use all due diligence to obtain title to the lands hereinbefore described within Two (2) years from this date and will convey the same to the parties of the second part herein for the sum of Fourteen ($14.00) per acre, it Being Understood and agreed that the party of the first part herein is not required, under the terms of this contract, to obtain such title whenever it would be required to pay any sum in excess of Fourteen ($14.00) dollars per acre for such land. And the parties of the second part herein agree that they will pay the said sum of Fourteen ($14.00) Dollars per acre upon tender of good and sufficient title, as

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the same may be secured from time to time during the period of Two (2) years aforesaid, to any of the lands herein set forth and will execute a good and sufficient bond in favor of the party of the first part herein conditioned that upon tender of good and sufficient deed to any of such lands save and excepting where surface rights only are required by the party of the first part under the terms hereof, then and in that event such surface rights shall be considered a full compliance with the terms hereof and such payment of Fourteen ($14.00) dollars per acre shall be made, it being understood and agreed, however, that such purchase and payment of and for the lands hereinbefore designated is conditioned upon the sale and disposal of all of the stock of the parties of the second part herein in the Rocky Mountain Cattle Company under the terms of this agreement prior to such purchase and payment; should such title be perfected and offered before the sale of the stock of the parties of the second part herein, then the payment shall be made at the rate of Twenty ($20.00) per acre for such land.

"It is understood and agreed by and between the parties hereto that the right of possession of the parties of the second part, without let or hindrance of the party of the first part, to the lands hereinbefore set forth shall continue during the period of Two (2) years herein designated and that the Quit-claim deed shall contain a clause to that effect and the parties of the second part paying the taxes thereon.

"It is understood and agreed by and between the parties hereto that a deed or deeds to the lands hereinbefore designated, as titles shall be acquired from time to time under the terms hereof, shall be tendered to S. C. Parks, of Cody, Wyoming, who shall be authorized by the parties of the second part herein to receive such deed or deeds and make payment therefor within Thirty (30) days of such tender.

"It is further understood and agreed by and between the parties hereto that the party of the first part herein does not guarantee the procurement of title to any of the land hereinbefore designated within the time designated, but agrees to use all reasonable diligence to procure the same under the

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terms and conditions of this contract and the parties of the second part agree that they will not molest or hinder the party of the first part in its endeavor to procure such titles.

"It is further understood and agreed by and between the parties hereto that at the expiration of Two (2) years from the date hereof the party of the first part shall submit to E. E. Enterline and E. T. Clark of Sheridan, Wyoming, at Sheridan, Wyoming, such muniments of title as it or its agents or trustees then possesses or possess to lands hereinbefore described but which have not been, in the meantime, conveyed, to the parties of the second part, under the terms of this agreement, and the said E. E. Enterline and E. T. Clark shall thereupon determine what muniments of title are sufficient, in their judgment, to warrant the party of the first part conveying or assigning its right thereto in the lands to which such muniments of title pertain to the said parties of the second part, as well as the parties of the second part receiving the same, and designate the character of instrument or instruments in writing by which the ownership thereto shall pass from the party of the first part to the parties of the second part, the parties of the second part agreeing to pay the sum of Fourteen ($14.00) Dollars per acre for all such lands or muniments of title so conveyed or assigned."

The petition aforesaid, after setting out said contract, describes the lands covered thereby to which said petition relates by classifying them as Parcels 1, 2, 3 and 4, respectively, and designating the land in controversy here as Parcel 3. The allegations as to Parcel 4 were eliminated upon demurrer. The petition alleges and the answer admits that title to the separate tracts described as Parcels 1 and 2 respectively was acquired by the defendant Phelps and conveyed to the plaintiffs within the two year period prescribed by the contract,—title to Parcel 1 having been acquired in May, 1913, and conveyed to plaintiffs in August of that year, and title to Parcel 2 having been acquired in June, 1912, and thereafter conveyed to plaintiffs. The averment as to Parcel 2 does not state the date of its conveyance to the

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plaintiffs, but it must have been within said two year period, for, as shown by the evidence, no muniments of title covering that parcel were submitted at the end of that period.

The petition aforesaid alleges certain other facts which are admitted by the answer of said defendants, including the following:

That the defendant Phelps for a long time prior to May 9, 1912, was and ever since has been the president of the Rocky Mountain Cattle Company, and executed and delivered said contract as such officer; that he owned a large majority of the stock of said company, and managed its business and dictated its policy; that in his proceedings to secure title to said lands he was acting for the company; that said company was at all times dominated and controlled by him; and that he signed and executed said contract, thereby binding himself to all the covenants and conditions thereof. That during all the times referred to said Company was the owner of 320 acres of "Jed L. Washburn Forest Lieu Scrip", authorized by certain stated Acts of Congress and regulations of the Secretary of the Interior, which gave the owner of such scrip the right to select, enter and receive patent in the name of said Jed L. Washburn, but for the use and benefit of the owner of the scrip, a number of acres of vacant public lands open to settlement equivalent to the amount of scrip so held by the owner. That when said contract was executed most of the lands therein described had been selected by this state under its various land grants, and applications had been made by the defendant Phelps on behalf of said company to purchase the same from the state; that the remainder of said lands had theretofore been entered with said "Forest Lieu Scrip" for or on behalf of the defendants; and that the defendants, at the date of the contract, had already secured substantial rights to each and every parcel of land described therein. That on April 5, 1911, the defendant Phelps, acting for and on behalf of said company, selected and caused to be entered in the United States land office at Lander, Wyoming, in the name of said Jed L. Washburn, the lands described as Parcel 3, using for said

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entry a part of said 320 acres of the Jed L. Washburn Forest Lieu Scrip, owned by said company, and that said defendants used great diligence to obtain title to said Parcel 3, and on the 7th day of May, 1914, patent thereto was issued by the United States in the name of said Jed L. Washburn.

It is also alleged as to said Parcel 3, but denied by the answer, that after the issuance of the patent thereto, and on the 13th day of August, 1914, and in violation of the terms of said contract, the defendant Phelps caused said land to be conveyed to himself and that he still holds the legal title thereto. It is assumed in the brief of plaintiffs that it was intended by the denial of said averment to deny only that the conveyance alleged was in violation of the contract, and presumably that is what was intended, for it appears that the land was conveyed to the defendant Phelps on the date alleged, under a power of attorney executed by said Jed L. Washburn to whom the patent was issued.

The petition further alleges that said defendants at the expiration of two years from the date of the contract refused and still refuse to submit any muniments of title to said Enterline and Clark, claiming that plaintiffs have no right to any of said lands. This was also denied by the answer. There are other averments of the petition denied by the answer which need not be recited here but may be referred to in the course of the discussion if found necessary.

The answer alleges as a separate defense that the defendants did not, during the two-year period aforesaid,—two years from May 9, 1912, possess any muniments of title to the lands designated in the contract, save and except to those parcels which were conveyed during that period to the plaintiffs under the terms of the contract, and that the plaintiffs were notified of that fact on May 13, 1914, and that the contract was terminated and closed. That no demand was made upon the defendants for the conveyance of the land designated as Parcel 3 until August 28, 1914, at which time the plaintiffs believed the land to be of great value because of the discovery of valuable mineral thereon, which dis-

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covery had been made by said defendants a few weeks prior to that date, and that such demand was made solely because of such valuable discovery of mineral. That on May 9, 1914, said defendants were not in a position to offer the plaintiffs any better title to the said land than they were on May 9, 1912, when the contract was entered into, and could not on May 9, 1914, and for a month subsequent thereto, offer any other muniment of title thereto than they were in possession of at the date of the contract. A reply was filed denying generally said new matter in the answer.

The following facts are shown by the evidence: On May 9, 1912, the date of the contract aforesaid, the plaintiffs executed to the defendant company a quit claim deed conveying the land described in the contract, which deed was thereafter duly recorded, and it contained, as required by the contract, a provision reserving a right of possession in the plaintiffs "for two years hereafter," that is to say, two years after the date of said deed, or until and including May 9, 1914. That deed, or the copy thereof in the record, also recites as the consideration therefor the payment to the grantors, the plaintiffs herein, of the sum of $20,400.00, by the said grantee, the defendant company; but the contract states such consideration as $20,800.00, and that sum is mentioned in the testimony as the consideration. Mr. Nicholson, one of the plaintiffs, explained the consideration and the reason for the contract provision for the deed, when testifying as a witness, as follows:

"In the original agreement of the dissolution of the Rocky Mountain Cattle Company we arrived at so much land should go to Mr. Merrill and myself and so much should go to himself. On the books of the company there were two charges, $200,000 against L. G. Phelps and $100,000 against Merrill, Pennoyer and myself. For that $100,000 so much land was to be turned over to us by warranty deed. It was made out and when it was gone into and we hunted up the titles there was a certain part of that for which there was no title so that in 1912 we agreed to quit claim back the land

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to Phelps and he was to surrender to us that $20,800 for which he had already charged us."

Mr. Phelps testified concerning the matter: "Growing out of a deed in 1911, the sufficiency of which was questioned, at a meeting, or at several meetings, in May, 1912, the present agreement was entered into by which under the contract I bought back or the Rocky Mountain Cattle Company bought back all the lands in which the titles was questioned, and $20,800 was paid in cash for this property and I entered into possession of it, or the Rocky Mountain Cattle Company, whichever you wish to style it, and in order to compromise any question and to settle all matters amicably it was agreed that for two years Merrill, Nicholson and Pennoyer were to occupy the lands and I was to use my best endeavor to secure title to the land." An objection being made to the statement of the witness, "it was agreed", he added: "I have stated the reason, part of my titles were questioned and I bought back the land," paying $20,800 for it.

The defendants had no notice or knowledge of the issuance of the patent to Parcel 3 on May 7, 1914, until the receipt by Mr. Phelps between the 19th and 23rd of May, 1914, of a postal card from the Land Office at Lander, Wyoming, dated May 15, 1914, stating that a patent had been issued to Jed L. Washburn, and that upon surrender of the proper evidence of ownership it would be delivered to the holder of the title; and the patent was obtained by Mr. Phelps on August 13, 1914. On that date also the land was conveyed to him by deed executed in the name of Jed L. Washburn by Ed. T. Clark, his attorney in fact.

By an agreement dated August 12, 1914, but acknowledged on August 13, 1914, Mr. Phelps leased the land to the Ohio Oil Company, a defendant in this case, for the purpose of mining and operating for oil and gas and laying pipe lines, constructing tanks, buildings and other structures thereon to take care of said products. Under that lease a producing oil well was drilled on the land by said oil company in October, 1914. The land is shown to be valuable for

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oil purposes, and to be worth "several thousand dollars". And Mr. Phelps testified, and we think the fact is to be inferred also from other testimony, that when the land was leased it appeared to have a large prospective value because of oil discoveries on other lands; but it does not appear whether such discoveries were or were not in the immediate neighborhood of the land in controversy.

The two-year period prescribed by the contract having expired on May 9, 1914, Mr. Phelps, on that date, wrote to the Mr. Clark named in the contract to act with Mr. Enterline in passing upon any muniments of title submitted by defendants at the expiration of said period requesting him to inform Mr. Enterline that he, Mr. Phelps, had no other muniment of title, and, therefore, desired to terminate the contract; and on May 13, Mr. Clark wrote to Mr. Enterline to the effect that he had received a letter from Mr. Phelps stating that with the exception of some lands already conveyed and for which he had been paid there was no change in the conditions affecting the remainder of the lands and that "we would be glad to take up this matter with you so that it may be closed." He received no answer to that letter, but on the day it was written he met Mr. Enterline, told him that he had written the letter and explained its contents, whereupon he was asked by Mr. Enterline if there were any different muniments of title, if he had any other muniments of title than they had on May 9, 1912. Mr. Clark replied: "No, we have no other proof of title than we had at that time." And Mr. Enterline then said that he should consider the contract closed and would write his clients (the plaintiffs) to that effect. On August 26, 1914, Mr. Enterline notified Mr. Clark that he wished a consultation about the Nicholson-Phelps contract, and Mr. Clark then informed him that "we considered the contract closed".

As testified by two of the plaintiffs, money was left or deposited by the plaintiffs with Mr. S. C. Parks of Cody, during all the time after the date of the contract, to pay for

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such deeds as might be tendered and accepted under the contract.

The exact time when the plaintiffs first learned that a patent to the land had been issued or when demand for a conveyance of the land was made upon Mr. Phelps, is not definitely shown by the record, owing to the absence therefrom of a letter and telegram introduced in evidence, as exhibit, through no fault, however, of the official reporter who certifies that the missing exhibits were, after the trial, handed to one of the attorneys for the plaintiffs at his request and had not been returned, but, as he, the reporter, was informed, they had been mislaid or lost. But the time when the plaintiffs learned about the patent seems to have been after the first of June, 1914; and the demand for a conveyance, which was by telegram from Mr. Enterline,—the missing telegram, was probably in August, at or about the time when Mr. Enterline notified Mr. Clark of his desire for a consultation about the matter, or on August 28, 1914, as alleged in the answer.

The contract aforesaid, in addition to the provisions thereof above quoted, provided for the sale or division among its stockholders of certain other real and personal property of the defendant company, which, as recited in the contract, included all the property of said company, and for the division thereafter of its cash assets, and that after such division of cash assets the parties of the second part named in the contract,—the plaintiffs herein, shall deliver to L. G. Phelps all the capital stock of the company held by them, viz: 1100 shares, at a price of ten cents per share. A time limit was fixed for the sale or division of the property. Thus the sale of a specified ranch by the company to Phelps at a stated price was provided for within 7 days from the date of the contract, with a provision for repayment of part of the price to Phelps by the plaintiffs if the scrip title to a forty acre tract should fail within 2 years from the contract date. The division of certain live stock within 6 days was provided for, and also within the same period the purchase of other live stock of the company by Phelps at a valuation

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fixed by the plaintiffs, or upon his failure to purchase them, within said period of 6 days, then for their purchase at such valuation by the plaintiffs. Provision was made for rebranding all such live stock, and for suspending the use of their former brand for one year; and that if Phelps should purchase the cattle as authorized he should have 2 years in which to gather them, at the expiration of which time the brand should become the property of plaintiffs, or if the cattle were purchased by plaintiffs the title to the brand should vest in them at the expiration of one year.

It appears from the evidence that all the shares of stock of the plaintiffs in said company were delivered to Mr. Phelps sometime in August, 1913, thereby eliminating the condition fixing the price to be paid for the land at $20 per acre. The provision of the contract for the payment of that sum instead of $14 per acre is explained in the testimony of the plaintiff Nicholson as follows: "If the land was deeded to us prior to the delivery of the stock to Mr. Phelps, Merrill, Pennoyer and myself would have participated in our $20 paid. After the delivery of the stock, $14 went to Mr. Phelps, and we had no participation in it then."

The question which we think first necessary to be considered is the character and extent of the obligation of the defendants, under the contract, to convey any of the land therein described to the plaintiffs, and in that connection what obligation was imposed upon defendants to tender a deed to the land in controversy, or submit muniments of title thereto. The contract contains two provisions which, while interdependent and to be construed together in the light of the whole contract, are in a sense separate and distinct. The one which we shall refer to as the first because it first appears in the contract requires due diligence on the part of the defendant company to obtain title to the lands described in a preceding paragraph within two years from the date of the contract and the conveyance thereof to the plaintiffs for the sum of $14.00 per acre, and that the plaintiffs shall pay that sum per acre upon tender of good and sufficient title during said period of two years, as the same

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may be secured from time to time, during that period. That is to say, we think that provision is to be construed as obligating the plaintiffs to accept and pay for any of the land upon tender of good and sufficient title during said two-year period, so that the plaintiffs would not be bound under that provision, even though title was secured during said two-year period, to accept or pay for any land unless a good and sufficient title was tendered during that period; and a tender of title under that provision is required to be made to S. C. Parks of Cody, who was to be authorized by the plaintiffs to receive such deed or deeds and make payment therefor within 30 days of the tender.

The consideration for the agreement to use diligence in securing title and then to convey was the reciprocal agreement of the plaintiffs contained in the same paragraph to pay the prescribed sum per acre upon tender during the two-year period of good and sufficient title. The consideration for such agreement was not the payment of the sum of $20,800 recited in the beginning of the paragraph, for that was the consideration passing to the plaintiffs for their quit-claim deed. And that sum was actually paid to the plaintiffs for their conveyance back to the company, as representing, according to the evidence, the amount which had been charged against them on the books of the company for the land. We find nothing in the evidence or admitted facts to substantiate the statement in the brief of plaintiffs that the contract was made to relieve the company from its covenant of warranty, and that for such release defendants agreed to acquire title to the 1040 acres and convey same to plaintiffs. On the contrary, we think the reasonable inference from the evidence and the contract itself is that the plaintiffs did not care to rely on the warranty and hold the lands with the imperfect titles, but preferred a return of the money charged against them therefor, and thereafter to take the lands only if and when good title should be acquired and conveyed within the time specified in the contract. And that would not have been an unreasonable preference in any case, in the absence of some intended

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special use sufficient to justify the taking of chances of title being perfected; the future prospective value of the land for oil purposes not being then apparent. But since all the property and assets of the company were soon to pass into private hands, leaving no ostensible reason for the continued existence of the company, it seems entirely reasonable for plaintiffs to have preferred a return of the money consideration.

The second provision requires the company, at the expiration of said period of two years, to submit to E. E. Enterline and E. T. Clark at Sheridan, Wyoming, such muniments of title as it or its agents or trustees then "possesses or possess" to lands which had not in the meantime been conveyed to the plaintiffs, who shall determine what muniments of title are sufficient, *in their judgment,* to warrant a conveyance or assignment by the company of its right to the plaintiffs, or their receiving the same, and designate the character of instrument to be executed to pass the ownership in the lands to which such muniments pertain, and that *for all such lands or muniments of title so conveyed or assigned* plaintiffs shall pay said sum of $14 per acre. This provision seems to eliminate the necessity of tender of a deed or deeds to Mr. Parks for any land embraced in or covered by muniments of title submitted thereunder at the expiration of said two-year period. There is a slight indication by the words used in this provision that there may have been in the minds of the parties at the time a thought of a transfer under it of something less than a complete and perfect title; but, if so, it must certainly have comprehended more than was possessed at the date of the contract.

Now this contract is in some important respects unlike the ordinary contract for the sale of land, where there is an unqualified agreement to sell and buy, assuming that the vendor has or will be able to convey a good and sufficient title. The parties to this contract all understood that the vendor did not have a perfect title and might not acquire such a title to any of the lands within the specified time, if

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at all; and the plaintiffs knew exactly the kind of right and title then held. And, since the plaintiffs had objected to that title as imperfect or insufficient, and required by the contract as a condition to their accepting and paying for any of the land, first, a tender of good and sufficient title within two years, expressly without a guaranty that such title would be secured within that time, or, second, a submission, at the expiration of said period, of muniments of title to parcels not previously conveyed, then in the possession of defendants, their agents or trustees, for determination by certain named representatives of the parties respectively, as to whether the rights to lands shown thereby shall be conveyed or assigned or accepted, the defendants had the right to assume that if they had no further muniments of title than at the date of the contract they would not be accepted nor a deed conveying the land covered thereby. And they were not required, we think, at or before the expiration of the two-year period, as to lands for which they possessed only such muniments of title as they had at the date of the contract, to either tender a deed thereto or submit such muniments of title. That this was also the understanding of the parties may be inferred from the fact stated in the testimony of Mr. Phelps and undisputed that as to each tender of a deed during the two-year period a very clear showing of good title was required, supplemented, if needed, by the testimony of Mr. Merrill that Mr. Parks did not feel capable of determining whether a tendered deed was good and thought someone should be appointed, and that Mr. Walls (an attorney of Cody) was suggested "to say whether it was a good and sufficient deed." This testimony of Merrill was given when asked on cross-examaniation what his instructions were in reference to muniments of title before the money of plaintiffs in the hands of Mr. Parks should be paid, the witness having testified that Mr. Parks had been instructed to pay over the money if there was a sufficient deed.

This contract was the result of an arrangement between the stockholders of the defendant company to dispose of its

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property and assets by distributing the same among such stockholders according to their respective interests, and was a part of the process adopted to accomplish that object. The buying of certain of the property by particular stockholders or by one of them seems to have been but a means to that end. And this tends to explain the care exercised by the plaintiffs to have a good title to the lands described in the contract if they were to take them instead of their estimated value in money, and the provision of the contract for the conveyance and acceptance thereof only with good title and within the limited period aforesaid. Time was clearly of the essence of the contract. Even the right of possession reserved in the plaintiffs by the contract and quitclaim deed was limited thereunder to two years, possession, as shown by the evidence, having been taken under the warranty deed. The provisions of the contract relating to these lands are to be construed in the light of the purpose aforesaid clearly revealed by the contract itself.

Although the patent to the parcel now in controversy was issued at Washington, D. C., on May 7, 1914, two days before the expiration of the two years, that fact was not known to either of the parties until at least ten days after the expiration of said period, when the defendant Phelps received notice by mail from the Land Office where the entry had been made. In the meantime, Mr. Enterline, representing the plaintiffs, was notified on behalf of defendants that they had no further muniments of title than at the date of the contract for land not already conveyed, and upon receiving that information he declared that he should consider the contract closed and would write his clients, the plaintiffs, to that effect. In that notice to Mr. Enterline there was clearly no intentional misrepresentation of the fact, nor, as we think, any actual misrepresentation, within the meaning of the contract.

To complete the title held at the date of the contract not only a patent from the United States was necessary, but also a deed from the grantee named in the patent, though provision for the latter, as we understand, had been made

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through a power of attorney, presumably in the possession or under the control of the defendants at the date of the contract, since, as admitted by the pleadings, the land was entered at the land office in April, 1911. But the execution of a deed from such grantee could not properly be required or expected until the issuance and delivery of patent, or at least until the parties knew that the patent had been issued; and if a deed had been executed and tendered or submitted under this contract, without a showing or knowledge that patent had issued, and a deed from the grantee named therein, it is quite improbable that it would have been accepted or regarded as a compliance with the contract requiring payment of the agreed price. And there is nothing in the case even tending to show that the ignorance or want of knowledge of the parties that patent had issued was inexcusable.

Thus the only muniments of title to the parcel in question that could in fact or actually have been tendered or submitted on that date were those which the defendants held at the date of the contract; and there was no apparent reason for submitting those muniments of title on the date of the expiration of the two-year period, unless accompanied by other muniments acquired after the contract was made. But the contention of the plaintiffs as to this particular parcel is that as title was actually obtained by defendants within the two-year period, they became obligated to convey the same to the plaintiffs for the stipulated price. That is not, however, technically or in fact, true. A legal or fee simple title was not then acquired by defendants because no deed to either of them conveying the title of the grantee named in the patent had been executed, and the defendants, through no fault on their part, were without knowledge or information of the fact that might have made the execution of such a deed proper. Title did actually pass to Jed L. Washburn, the grantee named in the patent, on the date that it was issued and recorded in the proper office at Washington, viz: May 7, 1914, assuming that it was recorded on the date that it was issued, for delivery of a land patent by the United States is not essential to the taking effect of the granting

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clause in the instrument, and the defendant Phelps or the company had the right to possession of the patent, upon complying with the rules of the land department in that respect. (U. S. v. Schurz, 102 U. S. 397, 26 L. Ed. 167.) On that date, however, as well also on the date of the expiration of the two-year period, the defendants did not have actual possession of the patent, and could not produce it in support of a tender of title by deed or for submission as a muniment of title; and they did not obtain such possession of it until August 13, 1914. According to the notice received by Mr. Phelps from the land office, proper evidence of ownership was required as a condition to the delivery of the patent.

While in a broad sense, taking into consideration the fact of the issuance of the patent not known to either of the parties at the time, the tender of a deed during the last three days of the two-year period properly conveying Washburn's title to the plaintiffs might have been a tender of good and sufficient title, the defendants were not then in a position to make such tender with muniments of title confirming its sufficiency, as contemplated by the contract and as required in the case of tender of title to other parcels, to require acceptance and payment by the plaintiffs. And we think it plain that the defendants were not at fault in failing to make a tender as to the parcel in question. Indeed, this action does not seem to be predicated upon a wrongful failure to tender title under the first provision of the contract for transferring title, but only upon the alleged refusal of the defendants to submit muniments of title at the expiration of the two-year period. For there is no averment in the petition to the effect that the defendants wrongfully failed or refused to tender title within the time prescribed therefor.

We think there can be no doubt that the provision of the contract requiring the defendant company to submit to Mr. Enterline and Mr. Clark, at the expiration of two years from the date of the contract, such muniments of title as it or its agents or trustees "then possesses or possess" has reference to muniments possessed at the expiration of said period,

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that is to say, on May 9, 1914, as distinguished from muniments possessed after but not on or before that date; and also, we think, to muniments so possessed as to be capable of being submitted in some proper way at the time specified. The word "possess" or "possesses", as used in that provision of the contract, must be considered and construed in connection with what was required to be done, and in view of the circumstances aforesaid under which the contract was made, and the evident purpose thereof. The word seems to be used in this contract not only in the sense of or as implying ownership, or the right to possession or control, but equally in the sense of custody or actual as distinguished from merely constructive possession. "Muniments of title" is said to be a general expression for all means of evidence, by which title to real property may be defended. (28 Cyc., 1779.) Or as generally defined it refers to title deeds and other documents relating to the title to land. That which is required to be submitted at the expiration of said period is, therefore, documentary evidence of title.

The defendant company did not, however, at the time stated, possess the patent, except perhaps constructively, and of that it had no knowledge, nor was it in the possession of an agent or trustee of the company. Constructive possession merely without knowledge of the fact or facts creating it, due diligence having been used to obtain title, is not, we think, what was intended or contemplated. And it may be doubtful if mere knowledge that it had been issued, communicated to the arbiters, without ability then to submit it, would have required them to consider it, or the plaintiffs to accept and pay for the land.

So that without fraud, collusion or fault on the part of the company or any agent or trustee it could not submit the patent for the consideration and determination provided for, at the time specified. It did all that it was then able to do. Promptly at the expiration of the period aforesaid notice was given to Mr. Clark and by the latter to Mr. Enterline that the defendants had no further muniments of title to land covered by the contract provisions aforesaid not already

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conveyed. And upon that, the contract was verbally declared closed. This, we think, amounted to a rejection of muniments held at the date of the contract as insufficient and relieved the defendants from the duty of presenting them.

No provision was made in the contract for any further examination of titles; but the plaintiffs bound themselves as to land for which muniments were to be submitted at the expiration of the period aforesaid only to pay for lands or muniments of title conveyed or assigned under the determination provided for upon muniments so submitted. If the defendants had been negligent or at fault in failing to learn of the patent, or had fraudulently concealed a fact known to them, a different question might, perhaps, be presented. But within the meaning of the contract, as we think it must be construed, they complied with the provisions of the contract as to this land for submitting muniments of title at the expiration of the period of two years. Had they thereafter proposed to submit the patent after learning of its issuance and receiving it, or other muniments acquired or received after the expiration of the two-year period, plaintiffs might or might not have accepted the same, but without obligation to do so. And there would be lacking a determination of the arbiters named in the contract as to the sufficiency of such muniments and the character of instrument for assignment or conveyance, provided for as a condition to the obligation of plaintiffs to pay the specified price. (Church v. Shanklin, 95 Cal. 626, 30 Pac. 789, 17 L. R. A. 207; Farm Land Mort. Co. v. Wilder, 41 Okla. 45, 136 Pac. 1078; Bank v. Clay (Okla.), 177 Pac. 115; Simmons v. Zimmerman, 144 Cal. 264, 79 Pac. 452, 1 Ann. Cas. 850; Goodwine v. Kelley, 33 Ind. App. 57, 70 N. E. 832; Hudson v. Buck, 7 Eng. L. Rep. Chan. Div. 1877-8, 683; Averett v. Lipscomb, 76 Va. 404; Warvelle on Vendors (2nd ed.), secs. 300-302.)

Church v. Shanklin, *supra,* was an action to foreclose a mortgage to secure notes made payable by defendants to plaintiff "whenever he perfects the title to" certain described

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lots "to the satisfaction of Church & Cory, attorneys." It was conceded that there was a defect in the title when the notes were executed requiring action by the plaintiff to cure; and it was not shown that the disapproval of the title by the attorneys named was through any fraudulent or improper motive. It was held that as the parties had made the attorneys the umpires between them, if the latter exercised their best judgment in good faith, their conclusion was final and binding, and not subject to the revisory power of the courts without doing violence to the plain words of the contract. This upon the principle upheld in many cases and stated in Butler v. Tucker, 24 Wend. 445, 449, as follows: "But when parties fix on an umpire and agree to abide by his decision, neither of them, without consent of the other, can withdraw the question of performance from the common arbiter for the purpose of referring it to the decision of a jury."

In Bank v. Clay, *supra,* it appeared that a contract for the sale of an oil and gas lease stipulated that the vendor should furnish to the plaintiffs a complete abstract of title to the land to be submitted to a certain named attorney for the vendees, and that the lease should take effect and the mutual obligations of the parties accrue only in case such attorney should approve the title. The abstract was furnished and upon examination by the attorney named he disapproved the title. Suit was thereupon brought by the vendees to recover a sum of money which had been deposited by them as "earnest money" to secure their faithful performance of the contract. The plaintiffs were allowed to recover, and the following rule was stated: "A vendee cannot be compelled to accept a title which is in fact perfect, but which his attorney in good faith refuses to approve where his contract requires the title to be perfected to the satisfaction of such attorney."

In the English case above cited, Hudson v. Buck, the contract provided for approval of title by the solicitor of Buck, the vendee. And it was held that said solicitor having disapproved the title, the vendor could not enforce specific

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performance, in the absence of *mala fides* or unreasonableness on the part of the purchaser or his solicitor. Discussing the question, the court said:

"What, then, does the law imply in the sale of a leasehold property? It implies that the vendor shall make a good title to the property. Is that the same thing as a stipulation that the contract shall be subject to the approval of the title by the purchaser's solicitor? It appears to me that it is not. Observe the difference between the results in the two cases. In the one case the approval or disapproval of the person specified is, in my opinion, in the absence of bad faith or unreasonable conduct, conclusive as to the goodness of the title shewn. In the other case the goodness of the title may be a matter for the decision of the court. * * * It appears to me that it is not unreasonable to suppose that the purchaser should desire to preclude the possibility of such a protracted litigation, and that he should intend to stipulate that the opinion of a particular person, his own solicitor, should be conclusive as to the sufficiency of the title deduced, and that, in the absence of compliance with that condition, the contract should not be capable of being enforced."

Thus upon the theory that the contract requires the defendants to convey the land in controversy to the plaintiffs, the requisite mutuality of obligation and remedy to justify a decree for specific performance would be lacking, under either provision of the contract relating thereto. In Frank v. Stratford-Hadncock, 13 Wyo. 37, 77 Pac. 134, 67 L. R. A. 571, 110 Am. St. Rep. 963, after stating that several so-called exceptions to the general rule that as a prerequisite to specific performance there must exist both mutuality of obligation and remedy had become established in modern equity practice, this court said:

"Where a contract is intended to bind both parties, or where it is of such form or nature that it contains mutual executory provisions, that is to say, where both parties have bound themselves or intended to bind themselves by reciprocal obligations, then no doubt the doctrine as to the requirement of mutuality applies; and in such a case, if for any

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reason one of the parties is not bound, he cannot compel performance by the other."

And in our opinion that principal would apply to the contract in this case if it is to be construed as obligating the defendants to convey this land upon the facts aforesaid. We do not, however, understand the obligation of defendants to convey land to which title shall be obtained within two years to be as broad as plaintiffs contend. The agreement in that respect does not stand alone but is qualified by the provisions for tendering title within said period and submitting at the expiration thereof muniments of title then possessed, for examination as to whether the title is good and sufficient in case of a tender, or the determination provided for upon the submission of muniments of title as to whether they are sufficient to warrant conveyance or acceptance. So that the defendants would not become obligated to convey any particular parcel of the land described unless title thereto was obtained and they were also in a position, acting diligently and in good faith, to tender good and sufficient title within said two-year period, or, at the expiration of said period could produce and submit muniments of title that might be declared sufficient to warrant conveyance under the provision of the contract for a determination as to that matter.

And without an obligation to convey there would be no ground for specific performance. Certainly the agreement to use all due diligence to obtain title within the period named, standing alone, would not furnish a basis for specific performance. (Parker v. Sargent, 201 Ill. App. 574.) In the case cited it was held that an agreement of a defendant to use his "best endeavors to convey" property to the complainant is not an agreement to convey. But here it is alleged that due diligence was used to obtain title.

For the above reasons the judgment denying specific performance must be affirmed. But there is a further ground upon which we would feel constrained also to affirm the judgment, and that is the laches of the plaintiffs in asserting their alleged right, in view of the changed conditions affect-

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ing the value of the land and the rights and interest of the parties.

A decree for the specific performance of a contract for the sale of real estate does not go as a matter of course, but is granted or withheld according as equity and justice seem to demand in view of all the circumstances of the case. (McCabe v. Matthews, 155 U. S. 550, 15 Sup. Ct. 190, 39 L. Ed. 253.) And courts of equity will not decree specific performance when to do so would be plainly inequitable and unjust. (Pomeroy v. Fullerton, 131 Mo. 581, 33 S. W. 173.) In Holgate v. Eaton, 116 U. S. 33, at page 40, 6 Sup. Ct. 224, 29 L. Ed. 538, it is said by Mr. Justice Miller that the following language of Mr. Justice Story in Taylor v. Longworth, 14 Pet. 172, 174, 10 L. Ed. 405, has become a legal maxim in this class of cases, viz: "In the first place, there is no doubt that time may be of the essence of a contract for the sale of property. It may be made so by the express stipulation of the parties, or it may arise by implication from the very nature of the property, or the avowed objects of the seller or purchaser. And even when time is not, thus, either expressly or impliedly, of the essence of the contract, if the party seeking a specific performance has been guilty of gross laches, or has been inexcusably negligent in performing the contract on his part; or if there has, in the intermediate period been a material change of circumstances, affecting the rights, interests or obligation of the parties; in all such cases courts of equity will refuse to decree specific performance, upon the plain ground that it would be inequitable and unjust."

In Pickering v. Pickering, 38 N. H. 400, the court said, stating a well-settled principle: "Relief by specific performance is matter not of absolute right in the party, but of sound, reasonable discretion in the court, and the granting of such relief must always be entirely equitable. The court will never compel specific performance, where, looking at all the circumstances on both sides, it is apparent that injustice would or might probably be done thereby."

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In such cases a court of equity will not allow of a delay which would enable a party to take advantage of the turn of the market, and have the contract performed, only in case it suits his interest. And in Drees v. Waldron, 212 Fed. 93, 128 C. C. A. 609, it is said: "The existence of laches is primarily determined not by lapse of time but by considerations of justice." In Patterson v. Hewitt, 195, U. S. 309, 25 Sup. Ct. 35, 49 L. Ed. 264, the court by Mr. Justice Brown, speaking for the court, states the rule applicable under circumstances such as are found in this case as follows:

"The defence of laches which prompted the dismissal of the bill in this case, has so often been made the subject of discussion in this court that a citation of cases is quite unnecessary. Some degree of diligence in bringing suit is required under all systems of jurisprudence. In actions at law, the question of diligence is determined by the words of the statute. If an action be brought before the statutory time expires, it will be sustained; if a day after, it will be defeated. In suits in equity the question is determined by the circumstances of each particular case. The statute of limitations consorts with the rigid principles of the common law, but is ill adapted to the flexible remedies of a court of equity. The statute frequently works great practical injustice—the doctrine of laches, never. True, lapse of time is one of the chief ingredients, but there are others of almost equal importance. Change in the value of the property between the time the cause of action arose and the time when the bill was filed; complainant's knowledge or ignorance of the facts constituting the cause of action, as well as his diligence in availing himself of the means of knowledge within his control, are all material to be considered upon the question whether the suit was brought without unreasonable delay."

In an opinion by the same learned justice, in a case involving mining property, where there had been a great increase in value, it is said: "Under such circumstances, where property has been developed by the energy and at

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the expense of the defendants, courts will look with disfavor upon the claims of those who have lain idle while awaiting the results of this development, and will require not only clear proof of fraud, but prompt assertion of plaintiff's rights." (Johnston v. Standard Min. Co., 148 U. S. 360, 13 Sup. Ct. 585, 37 L. Ed. 480.) And we quote the following from the case of Twin Lick Oil Co. v. Marbury, 91 U. S. 587, 23 L. Ed. 328, referring to the fluctuating value of oil wells: "Property worth thousands today is worth nothing tomorrow; and that which today would sell for a thousand dollars at its fair value, may by the natural changes of a week, or the energy and courage of desperate enterprise, in the same time be made to yield that much every day. The injustice, therefore, is obvious of permitting one holding the right to assert an ownership in such property to voluntarily await the event, and then decide, when the danger which is over has been at the risk of another, to come in and share the profit." (And see Anderson v. Luther Min. Co., 70 Minn. 23, 72 N. W. 820.)

In Patterson v. Hewitt, supra, it was further said: "indeed, in some cases the diligence required is measured by months rather than by years." So in the case of In re. Casey, 195 Fed. 322, the court said: "Laches is measured sometimes by years and sometimes by days, depending on the nature of the case and the circumstances."

In this case the land involved was of comparatively small value when the contract was made, but at or about the time of the expiration of the two-year period a possible or prospective increase in value became apparent through the discovery of oil upon other lands, and it appears that the plaintiffs were approached by representatives of the Ohio Oil Co., who proposed a lease to them for drilling upon the land, but the plaintiffs declined to lease it on the ground that they did not have title to it, showing this contract disclosing the extent of their interest. They learned of the issuance of the patent sometime thereafter, but just when does not appear, though, as we have stated above, probably between the early part of June and sometime in August, 1914, and

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then, through Mr. Enterline, made some demand upon the defendants,—probably for a conveyance, since the answer alleges that no demand for a conveyance was made until August 28, 1914.

After such demand it appears that the plaintiffs entered into some arrangement with another party to whom they assumed to give possession of the land, presumably for the purpose of exploring for oil, for it is shown that some oil well casing was placed on the land. On September 21, the Ohio Oil Company also placed some casing on the land; and the petition alleges, without stating the time, that said company, although warned not to enter into possession of the ground, did actually by force enter thereon and exclude the plaintiffs therefrom, and commenced drilling thereon. They succeeded in drilling a producing oil well in October of the same year. This suit was brought by the filing of the original petition on February 13, 1915, praying, in addition to specific performance as against the principal defendants a showing and accounting by the Ohio Oil Company of the oil and other substances taken from the land, a judgment against said company therefor, and the appointment of a receiver, if found necessary, pending the litigation.

Thus, with knowledge of the facts, the plaintiffs waited before asserting their right here claimed until the value of the land for oil purposes had been demonstrated by the defendant Phelps through his lease to said operating company, allowing their decision to insist upon what they now claim as their right to depend upon the success or failure of the drilling operations carried on at the expense of others. We think that a very prompt assertion of their alleged right was necessary to justify the exercise of equity jurisdiction for the enforcement thereof. With respect to the time intervening before suit was brought, as affecting the question of laches, it is apparent that the situation would not be materially different if there had been a much longer delay. The changed conditions causing the increase in value had already occurred, and while the plaintiffs remained inactive so far as this record discloses.

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The defendants strongly insist upon another ground as a complete defense to the action, in addition to the matters above considered, viz: The failure of the plaintiffs to execute the bond provided for in the contract. And the point is discussed at some length in the briefs, especially with reference to whether the defendants waived the bond by tendering title to and conveying other parcels of land, or are estopped from claiming any right under the provision for the bond and a non-compliance therewith. While we are not convinced that there was a waiver of the bond as to the parcel of land in controversy here, or that the doctrine of estoppel applies, we think it unnecessary to decide those questions or any other question relating to the effect of the provision for the bond or the failure of the plaintiffs to comply with it. *The judgment is affirmed.*

BEARD, C. J., and BLYDENBURGH, J., concur.

WYOMING CENTRAL IRRIGATION CO. v. LAPORTE.

(No. 878, Decided July 21st, 1919; 182 Pac. 485.)

APPEAL AND ERROR—ADMISSION OF DEPOSITION—DEFECT IN CROSS-PETITION CURED BY ANSWER—BREACH OF CONTRACT—WATER AND WATER COURSES—SALE OF WATER RIGHTS—DAMAGES FOR NON-DELIVERY OF WATER—SUBMISSION OF SPECIAL FINDINGS TO THE JURY—VERDICT ON CONFLICTING EVIDENCE—DAMAGES—INTEREST—JUDGMENT.

1. A defect in a cross-petition in failing to allege a breach of contract may be cured by admissions of the answer thereto.
2. The submission of special findings to the jury is a matter within the sound discretion of the trial court, and only a clear abuse of judicial discretion, prejudicial to the complaining party, will justify reversal.
3. A contract for the sale of water rights for irrigation providing for delivery at a point to be selected by plaintiff within three miles of the land, but silent as to the time of delivery, under which plaintiff indicated the point where water should be delivered, and defendant commenced to

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make delivery in the spring, but failed to make delivery thereafter during the irrigation season, held sufficient to support an action for damages, though the first of six annual installments for payment for the water rights was not due until after such irrigation season.

4. Where the deposition of a witness was taken in shorthand under an agreement that it should be transcribed, and be subject to objections, which, if made, should be passed upon by the Court before read, and each objection was ruled upon as the questions were read, no answer being read to the jury to which objection had been sustained, the fact that the deposition was not reduced to writing until the day it was offered, and the plaintiff had no opportunity to file general objections under the statute, was not prejudicial.
5. Where the evidence is conflicting, but there is substantial evidence to support the verdict, it will not be disturbed on appeal.
6. The amount of damages resulting from a breach of contract for furnishing water for irrigation, not being susceptible of easy proof, nor ascertainable by mere computation, the general rule that interest is not allowable on unliquidated damages should be applied.
7. Where interest was improperly allowed, but the amount thereof was stated by the jury in its special findings, the judgment should not be reversed, but should be modified by deducting the amount allowed as interest from the amount of the judgment.

ERROR to District Court, Natrona County, HON. WILLIAM C. MENTZER, Judge.

Action by the Wyoming Central Irrigation Co. against Nina A. Laporte to recover upon a contract for the delivery of water for irrigation, and the foreclosure of the contract. There was a judgment for defendant on a counter-claim and plaintiff brings error.

Edward H. Stearns and *P. B. Coolidge* for plaintiff in error.

Defendant's cross-petition fails to state facts sufficient to constitute a cause of action.

The written contract set forth controls its effect as a legal conclusion (Patrick v. Smelting Co., 38 Pac. 236; Hanover

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Co. v. Wilson, 143 Pac. 345). A condition precedent is determined from the intention of the parties (Frank v. Stratford-Hancock, 13 Wyo. 37; 77 Pac. 134; 39 Cyc. 1620). Payment of the first installment was a condition precedent to the use of water, and performance must be completed; the rule applies to a counter-claim (Hedstrom v. Baker, 13 Ill. App. 104). If waiver is relied upon it must be pleaded (Ins. Co. v. N. Y., 111 Pac. 507; Cement Co. v. Ulman, 140 S. W. 610). Failure to state facts sufficient to constitute a cause of action is never waived (31 Cyc. 608; Reed v. Browning, 30 N. E. 704; Grover Co. v. Ditch Co., 21 Wyo. 204; 131 Pac. 43). The evidence is insufficient to establish a cause of action against plaintiff, the first installment of contract not being paid (Johnson v. Tyng, 37 N. Y. S. 516; Omaha Water Co. v. Omaha, 156 Fed. 922; Godchaux v. Lumber Co., 59 So. 33). The Court erred in refusing an instruction as to the effect of failure to perform. The cross-petition fails to state a breach of contract; this is a fatal defect (Canal Co. v. Peters, 46 Pac. 74). There is a lack of allegation and of proof to show a breach of contract by plaintiff; the evidence shows that more water was used on the land than the contract called for; damages for failure to furnish water are unsupported by evidence (Crow v. Irr. Co., 62 Pac. 562). Objections to the reading of the deposition of Richards should have been sustained; the statute requires depositions to be filed at least one day before the trial, thus affording an opportunity to file written objections thereto (4579-4584 C. S.); plaintiff was entitled to an objection that deposing witness was no longer absent from the county (4578 C. S.; Sells v. Haggard, 21 Neb. 357, 32 N. W. 66, 13 Cyc. 988; Mo. R. R. Co. v. Elliott, 51 S. W. 1067). The court erred in permitting the admission of conclusions of the witness Richards as to who was responsible for lack of water (Modern Laws Ev. 1719; Chamberlayne 2349). There was no evidence that diversion of water by lesses of plaintiff in error during the season of 1908 was with its sanction. Instruction No. 8, given by the Court, is not in accord with the evidence. There

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was insufficient evidence upon which to predicate damages, if damages were sustained by the defendant in error, and the burden of proof was upon her. (Howard v. Brown, 148 N. W. 987.) The Court erred in refusing to submit special findings requested by plaintiff (4511 C. S.; Burke v. McDonald, 33 Pac. 49). The Court erred in instructing the jury to compute interest on damages found for defendant on her cross-petition, which were unliquidated (Rawlins v. Murphy, 19 Wyo. 253, 22 Cyc. 1512; Terrea v. Chabot, 121 Cal. 233; 53 Pac. 689; Anderson v. Adams, 74 Pac. 215). The Court erred in permitting the witness Richards to testify as to the total damage alleged to have been sustained by defendant (Old v. Keener, 43 Pac. 127). The Court erred in permitting evidence to be introduced as to the cost of planting defendant's crop, and in permitting defendant to state conclusions as to matters of which she admitted she was unable to state the facts (3 Chamberlayne, Sec. 1818). It was error to permit a cross-examination of plaintiff's witness as to complaints by other persons of insufficient water. The court erred in refusing to strike answers from the testimony of Witness Leon Laporte. The Court erred in permitting expert testimony from persons not qualified as experts (B. & O. R. R. Co. v. Shultz, 1 N. E. 331). The evidence clearly established a waiver of damages long prior to commencement of the suit.

J. J. Spriggs, for defendant in error.

Plaintiff admitted its obligation to furnish water under the contract in the year 1907, and having failed to do so, was liable in damage (Wyo. Cent. Irr. Co. v. Burroughs (Wyo.), 115 Pac. 434). It cannot change front on appeal (Farmer Bank v. Zokk (Mo.), 113 S. W. 678); while there was a conflict in the evidence on the question of damages, there was evidence to support the verdict and it will not be disturbed on appeal. (Madill Co. v. Davidson, 157 Pac. 354; Cassady v. Stuart, 161 Pac. 1026; Eoff v. Alexander, 161 Pac. 807; Tucker v. Railway Co. 161 Pac. 1147; Husband v. Hussey, 161 Pac. 1170.) An allegation that the

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complaining party has performed all conditions of the contract is a sufficient allegation of performance of conditions precedent. (4411 C. S.) The answer set forth a statement of defects in ordinary and concise language which was all that was required (4389-4390 C. S.). Pleadings are to be liberally construed (4416 C. S.) and immaterial defects disregarded (4438 C. S.). Courts will give sufficient contracts as the one here involved reasonable construction. (Melco v. Ins. Co., 59 Washington 681; 106 Pac. 194, 28 L. R. A. N. S. 593.) Defendant is entitled to interest, since her damages are easily computed. The appeal should be dismissed, since there was no motion for a new trial, as to the judgment complained of (Mill Co. v. Keith Co., 156 Pac. 943). The record on appeal was not certified as required by law (Campbell v. Bank, 158 Pac. 267).

BEARD, CHIEF JUSTICE.

This suit was commenced in the district court of Fremont county by the plaintiff in error against the defendant in error to recover the amount alleged to be due on a certain written contract for water rights for certain lands of defendant situated in said county, and for the foreclosure of said contract. The defendant filed a cross-petition or counter-claim claiming damages for alleged failures of plaintiff to furnish defendant with sufficient water, as required by the contract, during the years 1907 and 1908. Plaintiff applied for a change of judge, and Hon. William C. Mentzer, Judge of the First Judicial District, was called to try the case; and on plaintiff's application the place of trial was changed to Natrona county. Trial was had to a jury, resulting in a verdict and judgment in favor of defendant and against plaintiff for $6,885.25 and costs; from which judgment plaintiff brings the cause here on error.

By the terms of the contract upon which suit was brought, the plaintiff agreed to sell to the defendant "four perpetual water rights, to have the use of the waters flowing through that portion of its irrigation system constructed, or to be constructed, for the irrigation of the lands herein described,

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each water right representing and being the perpetual right to the use of one-half cubic foot of water per second of time, during the irrigation period of each year, the delivery and measurement of said water from the canal of said party of the first part (plaintiff) and its lateral ditches to be made by and in such manner as the said party of the first part may from time to time deem and determine for the best interests of both of said parties to this agreement and all others who hold like rights under similar agreements. This agreement for the sale of said water rights is hereby made subject to and under the express terms and conditions hereinafter set forth, to all and every one of which said terms and conditions the party of the second part (defendant), for herself, her heirs, and assigns, expressly consents and agrees: 1. The said party of the first part, its successors and assigns, is to furnish and deliver, at the point of delivery determined upon by said party of the first part, which said point is not to be more than three (3) miles from the lands hereinafter described, the amount of water, in said water right provided for, to the said party of the second part, her heirs and assigns, continuously, during the irrigation season of each year, except as hereinafter provided, and at no other time. 2. The said water shall be delivered by the said party of the first part, its successors or assigns, to said party of the second part, her heirs or assigns, from one of its main canals, subsidiary canals or lateral ditches, and the manner of withdrawing, distributing and regulating the supply of water from said system of irrigation works shall be prescribed, and its system maintained and operated, by the said party of the first part, its successors or assigns, in accordance with such rules as its Board of Trustees shall from time to time determine. 3. Said water shall be used for domestic and irrigation purposes only and only upon the piece or parcel of land, situate, lying and being in the County of Fremont, State of Wyoming, and more particularly known and described as follows, to-wit: North East Quarter of South East Quarter of Section thirty-four; North half of Southwest Quarter and Northwest Quarter of

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South East Quarter of Section Thirty-five, all in Township One North of Range Four, East of Wind River Meridian, containing one hundred and sixty acres."

The consideration to be paid for each of said water rights was $1,000.00, payable in installments. The first payment on each right to be $200.00, and the balance to be paid in five annual payments thereafter, of $160.00 each. The time for making the first payment, according to the printed contract, was when notice was given by plaintiff to defendant that it was ready to deliver water. That date was changed in writing upon the margin of the contract before the contract was executed so that the first payment on one of said water rights was to be made October 1, 1907, and on the other three October 1, 1908. It was provided among the numerous terms and conditions in said contract, "if from hostile diversion or obstruction, forcible entry, temporary damage by flood, or other accident, or any other cause beyond the control of said party of the first part, its successors or assigns, the full amount of water herein contracted for cannot be furnished as herein provided, the said party of the first part, its successors or assigns, shall not be in any way liable because of any such shortness or deficiency of water supply occasioned by any of said causes." The contract was executed May 8, 1907. It is very long, but we think the foregoing statement covers all of the terms thereof which are involved in this action.

On the trial the court instructed the jury, in substance, that under the pleadings and evidence there was due and owing to the plaintiff from the defendant under the contract the sum of $5,671.64, and that it should render a verdict for that amount in favor of plaintiff and against defendant on the causes of action set out in plaintiff's petition. The jury returned its verdict as directed on plaintiff's causes of action. On the causes of action set up in defendant's cross-petition or counter claim, the jury returned its verdict in favor of the defendant and against the plaintiff in the sum of $12,556.89. The jury also by direction of the court returned special finding from which it appears that of said last men-

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tioned verdict $8,312.55 was principal and $4,244.34 was interest. The court set off the amount of the verdict in favor of plaintiff against the amount of the verdict in favor of defendant and gave judgment in favor of defendant and against plaintiff for the difference, to-wit: $6,885.25, and costs.

At the close of defendant's evidence plaintiff orally moved the court to direct a verdict in favor of plaintiff and against defendant on the cross-petition or counter claim on the ground of insufficienty of evidence to sustain the same. The motion was denied, and that ruling is assigned as error. Also, at the conclusion of the evidence, plaintiff filed a motion to dismiss the cross-petition and to strike out all evidence taken thereunder for the reason that under the terms of the contract plaintiff was not required to furnish defendant water until the first payment was made, and that it was admitted that the first payment was not made until May 15, 1911. Also a motion for judgment in favor of plaintiff and against defendant on the cross-petition, on the ground that neither the cross-petition nor the facts therein alleged nor the evidence were sufficient to support any claim for damages. Said motions being denied, the rulings thereon are assigned as error.

There was no error in either of those rulings. By the express terms of the contract the first payment on one of the water rights was not to be made until October 1, 1907, and on the other three October 1, 1908; and the evidence was to the effect that the irrigation season in each year ended about October 1. The motions covered the entire claims and were not good for that reason, and also for the reason that there was evidence which required the court to submit the questions of fact to the jury. The time when plaintiff was to commence the furnishing of water was not definitely fixed by the contract, nor was the point of delivery definitely stated, but it was to be at some point within three miles of the land, which point of delivery was to be determined by plaintiff. The undisputed evidence of the manager of plaintiff is that at or about the time the contract was signed he

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told defendant that plaintiff would build a lateral to her place. He testified as follows:

"Q. I ask you the question if you didn't tell Mrs. Laporte in 1907 that if she would sign the contract, you would bring the lateral to the corner of her fence free of cost? A. I don't know that I told her if she would sign the contract, I would do that. I told her I would build the lateral to her place. Q. Free of cost? A. Free of cost." Plaintiff constructed the lateral accordingly and commenced the delivery of water in the latter part of May or forepart of June, 1907. By so doing, the point of delivery was determined by the plaintiff, and the lateral so constructed was a part of its irrigation system and under its control. The lateral and the right of way for the same were the property of plaintiff, and the claim that this was not done under the contract is without merit. No other time or point of delivery is shown by the evidence. Plaintiff having determined and stated to defendant at what point it would deliver the water, and having commenced to do so in the spring of 1907, if, as defendant alleged, it failed to do so during the irrigation season of that year, to the defendant's damage, it was not in a position to complain that defendant did not make the payment October 1, 1907. The damages for that year, if any, were sustained before anything was due.

It is contended that the cross-petition fails to allege a breach of the contract in that it does not allege a failure to deliver water within three miles of defendant's land. It is alleged in the cross-petition, in substance, that under the terms of the contract plaintiff agreed to deliver sufficient water to irrigate the lands described to the amount of one-half cubic foot per second of time for each of said water rights during the irrigation seasons of 1907 and 1908, and that it failed to do so. In its answers to said cross-petition, and to each count thereof, plaintiff says: "It admits that, under the terms of said water contract, the plaintiff contracted and agreed to deliver, at the point of delivery determined upon by the plaintiff, the amount of water in said water contract provided for." And it also avers that if at

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any time during said irrigation season it failed to deliver the full amount of water contracted for, it was through its inability so to do by reason of breaks in its canal caused by floods and other causes beyond its control, which breaks were repaired as speedily as possible. If there was any defect in the cross-petition it was cured by plaintiff's answer thereto.

It is further contended that the court erred in refusing to submit to the jury twenty-nine special findings requested by plaintiff. The court at plaintiff's request submitted to the jury eight other special findings by which the jury was required to find the amount of damages, if any, sustained by defendant to each kind of crops, and for each of the years 1907 and 1908. The court fully instructed the jury as to the measure of damages and what it should consider in arriving at the amount, as follows: "You are further instructed that should you find for the defendant on her cross-petition, in assessing the defendant's damages you will find for her the difference between the market value of the crops when matured that they would have made (if there be any difference), and that they did make (if there was any difference) and you will deduct from this amount, if any you find, such sums of money that the defendant would have had to expend that she did not expend, in harvesting, maturing, threshing, and placing said crops on the market." The jury found specially the amount of damages it awarded defendant on each kind of crops for each of the years 1907 and 1908; and it must be assumed that in fixing the several amounts that it followed the instructions; and we think the questions submitted to the jury and its answers thereto sufficiently show that it did so. The submission of special findings to the jury is a matter largely within the sound discretion of the trial court. "Much latitude within the general rule governing the practice must be accorded to the trial court, and only when there appears to have been a clear abuse of judicial discretion prejudicial to the complaining party will the action of the court in the premises justify a reversal of the judgment." (Wallace v. Skinner, 15 Wyo.

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233, 256, 88 Pac. 221, 226.) Applying that rule to the case at bar, it does not appear that the court abused its discretion in refusing to submit the special findings complained of.

Plaintiff objected and excepted to the admission in evidence of the deposition of the witness Richards on the ground that it had not been reduced to writing until the day it was offered to be read to the jury, and plaintiff had had no opportunity to file objections under the statute to the deposition. The deposition of this witness was taken by agreement by a stenographer in short hand, and it was agreed that it should be transcribed; that it should not be read in evidence until so transcribed; that the stenographer should not be called as a witness, "and when transcribed by him may be used in evidence in the above entitled cause, subject to all objections to such evidence, which shall be passed upon by the court before such deposition is read in evidence." It may be conceded that the parties intended to have the court rule upon the objections before the deposition was read; but it appears that each objection was ruled upon as the questions were read, and we are unable to see how the plaintiff was in any way prejudiced by that method. It does not appear that the answer to any question to which the objection was sustained was read to the jury.

Very many objections were made and exceptions taken to the rulings of the court in admitting and excluding offered testimony, the motion for a new trial containing more than forty pages of typewritten questions, objections, rulings thereon, and the answers when the evidence was admitted. It would serve no useful purpose, and would require a volume of the reports to discuss them separately. Very many of the objections go to the weight rather than to the competency, relevancy, or materiality of the testimony. A careful reading of the entire evidence in the record satisfies us that no such prejudicial error, if error at all, was committed in that respect as would justify a reversal of the judgment on that ground.

It is argued at great length in the brief that the verdict and judgment are not sustained by the evidence. On that

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question it should be sufficient to say that the evidence is conflicting, and the jury having passed its judgment upon it, and the trial court having refused to grant a new trial, and there appearing in the record sufficient substantial evidence to support the verdict and judgment, under the well settled rule, this court will not reverse a judgment on that ground. Furthermore, several witnesses testified by referring to two maps, only one of which was put in evidence, and in describing the location of lands, canals, laterals and headgates evidently pointed out those places on the maps, using such expressions as "This land here. There was a division box here that put water into this ditch. The land on the west side of the railroad would be irrigated from this here," &c. (No railroad being shown on the map in the record.) Those are but samples of the testimony of several witnesses, which the jury could understand and apply, but which are unintelligible to one reading the testimony.

There is but one other question in the case which we deem necessary to consider, and that is the question of interest on the amount of damages the jury found the defendant had sustained. Those damages were entirely unliquidated, and the general rule is that interest is not allowed on unliquidated damages. To that rule there are certain recognized exceptions, viz: demands based on market values, susceptible of easy proof; and in cases where the amount is capable of being ascertained by mere computation. (Kuhn v. McKay, 7 Wyo. 65, 49 Pac. 473, 51 Pac. 205; City of Rawlins v. Murphy et al., 19 Wyo. 238-253, 115 Pac. 436.) In the present case the amount of damages was not susceptible of easy proof, nor could it be ascertained by mere computation. Many witnesses were called to testify to the facts necessary to a determination of the amount of the damages, and there was a substantial conflict in their testimony. We think the case is one clearly within the general rule and that it was error to allow interest. But, as the jury by its special findings, stated the amount of interest it allowed, the judgment should not be reversed on that ground, but should be modified by deducting the amount allowed as

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interest from the amount of the judgment. The judgment being for $6,885.25, of which amount $4,244.34 is interest, the latter sum will be deducted from the former, leaving a balance of $2,640.91, for which amount the judgment is affirmed, and the cause remanded to the district court with directions to modify the judgment accordingly.

Each party to pay one half of the costs in this court, except that no costs will be taxed to either party for briefs.

Modified and remanded.

POTTER and BLYDENBURGH, JJ., concur.

KENDRICK v. HEALEY.

(No. 949; Decided August 18, 1919; 183 Pac. 37.)

APPEAL AND ERROR—ENTRY OF JUDGMENT—CERTIFICATION OF RECORD—TIME FOR FILING—PAGING OF RECORD—CORRECTION OF RECORD—SPECIFICATIONS OF ERROR—EXTENSION OF TIME FOR FILING OF RECORD.

1. An appeal record certified by the Clerk as containing a true copy of the judgment entered in the Journal and containing the original paper signed by the Court, preceded by a statement that it was entered by the Court upon the Court Journal bearing a notation as to volume and page is sufficient to identify such writing entered on the Journal, as the judgment.
2. An order extending time for filing a record on appeal under Laws of 1917, Page 32, Secs. 4 and 5, includes an extension of time for preparing and filing the transcript of the testimony, since, under Sec. 6 of the chapter, such transcript is a part of the record on appeal.
3. A clerk's certificate that "the foregoing transcript is a true and correct transcript of all the testimony offered at the trial of the above entitled cause" being the exact equivalent of the words of the statute, Laws 1917, Chap. 32, Sec. 5, is sufficient.
4. Where the Judge and Clerk each certify that an appeal record is true and correct, the order of time in which they make such certificates is immaterial if made within time for filing.

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5. The certificates of the Judge and Clerk to a record on appeal are not a part of the appeal record within Laws of 1917, Chapter 32, Sec. 6, as amended, requiring the record to be paged and numbered consecutively. The requirements as to paging and numbering is not jurisdictional, and necessary corrections may be made without withdrawing the record.
6. Service of specifications of error prior to filing of the record in appeal proceedings is not a ground for the dismissal of the appeal.
7. An order extending time for the filing of an appeal record may be made in chambers during the vacation of the court and becomes effective upon the signing thereof by the Judge within the original 70 days from the date of the entry of judgment, even if such extension order be not entered on the Journal for some time thereafter.
8. An appeal record may, on proper showing and seasonable application, be withdrawn for amendment in accordance with the facts; but the application to withdraw must set forth the specific amendment sought to be made and it must be made to appear that the amendment will cure a substantial defect.

APPEAL from District Court, Johnson County; HON. JAMES H. BURGESS, Judge.

Action by John B. Kendrick against Patrick Healey, Jr., and Alexander Healey, co-partners doing business under the firm of Healey Bros. Heard on plaintiff's motion to dismiss appeal and on defendant's to withdraw record for amendment.

Metz & Sackett and *Robt. B. Rose,* for respondent's motion to dismiss.

The record contains the files and not certified copies of the journal entries, and fails to show when, if ever, the orders, verdict or judgment were entered on the journal. The certificate of the judge precedes that of the clerk. The record is not paged and numbered as required by statute; no order extending time for preparing or filing transcript testimony. The record on appeal differs from the transcript of testimony which must contain all the testimony, with the rulings of the court. The certificate of the reporter is insufficient.

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The sufficiency of instructions given or refused cannot be reviewed unless the entire testimony be certified. (Wood v. Wood, 25 Wyo. 26; 146 Pac. 844.) No specification of errors was served after the filing of the record on appeal. The record is clearly insufficient under the decisions of this court. (Hahn v. Bank, 171 Pac. 889; Goodrich v. Bank, 123 Pac. 191, 177 Pac. 134.) The motion to dismiss should be sustained.

E. E Enterline and *Hill and Griggs,* for appellants, opposing motion to dismiss.

The appeal record is clearly sufficient under the statute. The recitals with the certificate of the clerk show proper entry within the required time; the certificate of the clerk shows full compliance with the statute. An order extending the time for the filing of appeal record was duly given and made in the time and manner required by the statute. Appellants have moved for leave to withdraw record and to make amendments, showing that it was filed in the time required by order of extension. The certificate of the reporter that the transcript is a true and correct transcript of all testimony offered in trial with the rulings of the court, in admitting or excluding evidence and that all exhibits offered are attached thereto, is a literal compliance with Sec. 5 of the appeal statute. The distinction between filing and serving specifications of error is made clear by the decision in Hahn v. Bank, 25 Wyo. 467, 171 Pac. 889, 172 Pac. 705. The objection as to paging and numbering the record is without merit. It is immaterial that the certificate of the judge is later than that of the clerk. The statute does not require pages containing certificate of judge or clerk to be numbered; the transcript of the testimony is clearly a part of the appeal record and is included in the order of extension.

BLYDENBURGH, JUSTICE.

This case comes to this court by direct appeal under the provisions of Chapter 32, Session Laws of 1917, before it was amended by Chapter 15, Session Laws of 1919, and was heard on the motion of plaintiff and respondent to dismiss

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the appeal and the motion of defendants and appellants to withdraw the record on appeal for amendment.

The motion of plaintiff to dismiss, as drawn, purports to state 12 different grounds, but they may be summarized under the following heads:

That the notice of appeal was given prior to the date of the entry of the judgment.

That there is no certified copy of the journal entry of the judgment, verdict, &c., in the record and therefore no proof of when the judgment was entered, if at all.

That the transcript of the testimony was not filed within the time required by the statute, and no order was made extending the time.

That the certificate to the transcript of the testimony does not comply fully with the requirements of the statute.

That the certificate of the judge is dated prior to the certificates of the clerk, and therefore the judge does not certify to what is contained in the certificates of the clerk.

That the record on appeal is not paged and numbered consecutively as required by the statute.

That the specifications of error were served prior to the filing of the record on appeal.

As to the statement that the notice was served prior to the entry of judgment the record shows the contrary. The notice is dated November 28, 1917, the acceptance of service of the notice November 30, 1917, and the date of the entry of the judgment, according to the certificate of the clerk, was November 23, 1917.

As to the statement that there is no certified copy of the journal entry of the judgment in the record, this court, in the case of Hahn v. Citizens State Bank, 25 Wyo. 467, 171 Pac. 889, 172 Pac. 705, decided that the record on appeal must show the entry of a judgment on the journal of the court and the date thereof, and that the proper way to show this was by a certified copy of the journal entry, and that a form of judgment signed by the judge and filed with the clerk appearing in the record, when nothing appeared to show that it had been entered on the journal, was not

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sufficient to give this court jurisdiction of the case on appeal. As such a form of judgment signed by the trial judge appears in the record on appeal in this case, counsel for respondent argued that the cases are similar and that there is no showing here of the entry of the judgment in this case. While the original paper signed by the judge appears in the record of this case, it is preceded by the words, "And be it further remembered that thereafter on November 23, 1917, the following judgment was entered by the court which said judgment is as follows, to-wit: "And this paper has upon it the notations of the clerk that it was filed in District Court, 4th Judicial District, Johnson County, Wyoming, November 23, 1917. A. W. Kennedy, Clerk, and that it is entered on the Court Journal. In addition to this, the certificate of the clerk at the end of the record on appeal reads as follows:

"CERTIFICATE OF CLERK.

"STATE OF WYOMING, }
COUNTY OF JOHNSON. } ss.

"I, A. W. Kennedy, Clerk of the District Court of the Fourth Judicial District of the State of Wyoming, in and for the County of Johnson, do hereby certify that the above and foregoing record on appeal contains true copies of the order of the court, verdict of the jury and judgment, given, made, returned and entered in said cause as follows, to-wit: * * * Of the judgment entered November 23, 1917, filed November 23, 1917, and entered in Journal 4 at page 4, said copy of judgment being found on pages 51 and 52 of the Record on Appeal.

"IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court this May 13, 1918.

"A. W. KENNEDY,
(SEAL) "Clerk of Court."

This certificate shows as fully as possible that the identical paper is a true copy of the entry on the journal and the date of the entry, and could not show more completely what the entry really was if a separate copy had been used instead of the paper which was the original paper from which the entry

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was made. There is nothing in the statutes that requires certificates to certified copies to be attached or immediately follow the entry certified so long as the identity of the record is shown.

As to the ground that the transcript of the testimony was not filed within seventy days after the entry of the judgment, and no order was made and entered extending the time in which to make or file such transcript; it is admitted that the record does contain an order extending the time for preparing the record. This order appears in the record on appeal and shows that it was made in chambers by the trial judge on Jan. 15, 1918, and by the endorsement on the back that it was filed in the office of the clerk of the trial court on January 18, 1918, and entered on court journal No. 7, on page 13. Sections 4 and 5 of Chapter 32, S. L. 1917, provide:

"Section 4. The appellant shall be entitled as a matter of right to seventy days after the entry of the judgment or order appealed from within which to prepare and file with the Clerk of the District Court a record for the appeal, which time may be by the Court or the Judge thereof, extended or enlarged for cause shown."

"Section 5. Whenever the party appealing desires to review the ruling of the District Court on the admission or exclusion of evidence, or questions the sufficiency of the evidence to sustain the verdict, finding, judgment, or decision, or alleges that the verdict, finding, judgment or decision is contrary to law, the party appealing shall cause to be prepared by the official court reporter a complete transcript of all the testimony offered at the trial, with each question consecutively numbered, and showing all rulings of the Court in admitting or excluding evidence, or in directing or refusing to direct a verdict for either party, which transcript of the testimony and rulings of the Court shall be certified to by the official court reporter as being true and correct, and as containing all of the testimony offered at the trial, with the rulings of the Court in admitting or excluding evidence, or in directing or refusing to direct a verdict for

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either party. When the record of the testimony offered at the trial, and the rulings of the court to be included herein, are prepared and certified as provided in this section, the same shall be filed with the Clerk of the District Court within seventy days from the date of the entry of the order or judgment appealed from, or within the time as extended by the Court or Judge."

It is also evident from Section 6 that the transcript of the testimony is a part of the record on appeal, and the extension of time mentioned in section 6 is that referred to in section 5. The time given for preparing the transcript and the filing of the record on appeal are the same, to-wit: Seventy days after the entry of the judgment, and an extension of time given for filing the record on appeal must include any part of the record. If it were considered that a special order were necessary to obtain the extension for filing the transcript, then to make it effective an additional order would also be necessary extending the time for filing the record. We are of the opinion that under this statute an order extending the time for filing the record on appeal includes an extension of time for preparing and filing the transcript of the testimony, and we so hold. That this was the intention of the trial judge in the present case is evident from the order itself extending the time, which is as follows:

"Now on this day, it having been made to appear, by the above named defendants, to the Honorable James H. Burgess, at chambers at Sheridan, Wyoming, that the said defendants will be unable to prepare and file with the Clerk of the District Court of Johnson County, Wyoming, a record for the appeal in said cause, owing to the fact that Charles L. Carter, official court reporter of said district, is unable to transcribe the testimony and evidence within the seventy days after the entry of the judgment, as required by Section Four of Chapter Thirty-Two, Session Laws of Wyoming, 1917, and it further appearing to the said Judge that the said defendants have fully paid the fees required for the transcription of said testimony and evidence, and it further appearing that the time to prepare and file with the Clerk

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of the said District Court a record for the appeal should be extended, and that good cause has been shown for such extension.

"IT IS THEREFORE CONSIDERED AND ORDERED by the said Judge, at chambers at Sheridan, Wyoming, that the said defendants be, and they hereby are, given until the 13th day of May, 1918, within which time to prepare and file with the Clerk of the District Court of Johnson County, Wyoming, a record for the appeal in said cause.

"Done at Chambers at Sheridan, Wyoming, this 15th day of January, 1918. "JAMES H. BURGESS,
"Judge."

The certificate to the transcript is as follows:

"I, Charles L. Carter, Official Court Reporter for the Fourth Judicial District of Wyoming, do hereby certify that the above and foregoing transcript is a true and correct transcript of all the testimony offered at the trial of the above entitled cause, with the rulings of the court in admitting or excluding evidence, and that attached to said transcript are all of the exhibits offered as a part of such testimony.

"IN WITNESS WHEREOF, I have hereunto set my hand this 28th day of February, A. D. 1918.
"CHARLES L. CARTER,
"Official Court Reporter, Fourth Judicial District."

It is contended that this does not comply with the statute as it does not contain the words "as containing all the testimony offered at the trial with the rulings of the court in admitting or excluding evidence." We hold the certificate to be an exact equivalent to the language that is claimed to be omitted. The English language will not admit of a different construction.

As to the ground that the certificate of the judge is dated prior to the certificates of the clerk, we hold that in no way affects the appeal. The statute provides: "The whole record shall be paged and numbered consecutively, and shall constitute the record on the appeal, and shall be certified

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to by the Judge and Clerk of the District Court as true and correct." If the order of the words have any effect or significance at all, the clerk should certify after the judge; but it is evident that the certificate of the judge is based on his personal knowledge as having presided at the trial, while that of the clerk is as to what appears from the records of his office. So long as each certifies that the record is true and correct and each certificate is within the time for filing the record on appeal, that is sufficient. Nor does the judge certify that the certificate of the clerk is true and correct, but that the record on appeal is true and correct.

The claim that the record on appeal is not sufficiently paged and numbered is based on the fact that the sheet on which appears the certificate of the clerk appears after the last page of the record numbered 409 and before the page on which appears the other certificate of the clerk and the judge which is numbered 410. In the first place, from section 6, it is evident that the certificates of the clerk and judge are not a part of the record that is required to be consecutively paged and numbered, and this requirement as to numbering is not a jurisdictional one for which the appeal could be dismissed, and if it were an oversight in a page strictly a part of the record, it could be cured here without withdrawing the record by placing the figures 409½ upon the unnumbered page.

In regard to the claim that "the specifications of error were served prior to the filing of the record on appeal", this matter was considered in the case of Hahn v. Citizens State Bank et al., *supra,* and in that case this court said:

"The reason for holding a notice of appeal premature when filed or served before the entry of the order or judgment appealed from does not necessarily apply with the same force to the filing and serving of specifications of error. The purpose of an assignment or specification of errors is to point out the specific errors claimed to have been committed by the court below and relied on for a reversal, for the information of opposing counsel and the reviewing court. (3 C. J. 1329.) If, under our statute, an appeal has been

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properly taken from a judgment or order duly entered, and within the time allowed, and the record is in such condition as will permit of the references thereto required by the statute or rules, there would seem to be no substantial reason for denying the right to file and serve specifications of error before the record is filed, or for construing the statutory provision limiting the time for filing and serving the specifications as meaning anything more than limiting the time beyond which the specifications may not be filed or served. * * * we fail to see any good reason for holding that the specifications may not then be properly filed and served, although before the record itself is or can be filed. In view of the purpose of the specifications of error, and the other provisions of the statutes, the provision of Section 8 that the specifications shall be filed and served within ten days after the record is prepared and filed, should, in our opinion, be construed as prescribing only the limit of time beyond which such specifications may not be filed or served; following the rule for the interpretation of such a provision referred to above in discussing the provision limiting the time for taking an appeal. That seems to us to be the fair and reasonable interpretation of the words of the limitation in Section 8 as applied to the subject matter, viz: The filing and serving of specifications of error."

This disposes of that question and all of the grounds urged in the motion to dismiss.

The appellants have filed a motion to withdraw the record on appeal for amendment: 1. To show that the order extending the time for filing the record on appeal, which appears in the record on appeal and as quoted above, is a proper copy of the order made by the trial judge as appears from the record of the court. 2. To show that said order was made, as appears on its face, at chambers on January 15, 1918, and was filed in the office of the clerk of the trial court on January 18, 1918, and was entered of record in the journal of said court on January 18, 1918. 3. To number the page between 409 and 410 as 409½. And generally, "in any manner this court may deem necessary to have the

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cause reviewed on the merits, providing the true facts warrant such amendment."

As was said above, the original order referred to appears in the record on appeal signed by the trial judge, and shows when and where made, and the endorsements thereon by the clerk show when and where it was filed and entered. There is nothing in the statute of 1917 that requires the order extending the time for filing the record to be entered or any time limit dating from the entry or anything which makes the entry jurisdictional. The order may be made in chambers by the judge during the vacation of the court, and, in our opinion, becomes effective upon the signing by the judge within the original seventy days from the date of the entry of judgment, even if not entered on the journal for some time thereafter. The certificate of the judge and clerk that the record in which appears this order is true and correct is all that is necessary to authenticate it. What was said above as to the sheet between page 409 and the page upon which appears the number 410 disposes of any necessity for withdrawing the record on the third ground stated in the motion.

While a record on appeal may, upon proper showing and seasonable application, be withdrawn for amendment in accordance with the facts, we have decided that such application would be denied where the amendment would not cure the defects, or, if so amended the record would show that it was not filed within the statutory time after entry of judgment, so that this court would remain without jurisdiction. (Goodrich et al. v. Big Horn County Bank et al., 174 Pac. 191.)

No application to withdraw the record can be considered unless the specific amendment sought to be made is definitely set forth and it is made to appear to this court that such amendment will be effective to cure some substantial defect. So an application stated in such general terms and without specific showing and proof of the truth of the matters where it is sought to amend the record, as is stated as to the last

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ground of the motion to withdraw the record, cannot be considered by this court.

The motion to dismiss will be denied. As we hold that no amendment to the record is necessary in this case and no good purpose would be served by withdrawing the record, the application to withdraw the record will also be denied.

BEARD, C. J., and POTTER, J., concur.

PETERSON v. TOWN OF GUERNSEY.

(No. 921; Decided Sept. 22, 1919; 183 Pac. 645.)

INTOXICATING LIQUORS—REVOCATION OF LICENSE—RECOVERY OF UNEARNED PORTION—STATUTES—LEGISLATIVE CONSTRUCTION.

1. The discretion of a Board of County Commissioners to grant, refuse, or revoke a retail liquor license is limited to the cause stated in the statutes. (C. S. 1910, Sec. 2835-2836.)
2. Where a retail liquor license is revoked by the Board of County Commissioners without the fault of the municipality that received the license money, the grantee cannot recover the unearned portion of such license fee paid voluntarily, and this is particularly true in view of Laws of 1911, Chap. 13, Sec. 1, providing that no liquor license money shall be refunded.
3. A construction of a statute by the legislature as indicated by the language of a subsequent enactment is entitled to great weight.

ERROR to District Court, Platte County; HON. WILLIAM C. MENTZER, Judge.

Action by Kate F. Peterson against the incorporated town of Guernsey, Platte County, to recover the unearned portion of a license fee for the sale of intoxicating liquors. From a judgment of dismissal, plaintiff brings error.

Kinkead and Henderson, for plaintiff in error.

There was no cause shown for the revocation of the license; the discretion of the board to revoke a license is

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limited to causes stated by statute. The courts will prevent an abuse of power (Bennett v. City, 76 N. W. 844; Peterson v. City, 46 Pac. 657; Allan v. Drew, 44 Vt. 174). A license cannot be revoked without cause (23 Cyc. 156); the unearned license money should be refunded (Bart v. Pierce Co. (Wash.), 111 Pac. 582; Northrop v. Graves (Conn.), 50 Am. Dec. 264; Scott v. New Castle (Ky.), 39 Am. Dec. 479; Allman v. Okla. City, 17 A. & E. Ann. Cases, 184 (Okla.)). Plaintiff paid money for a privilege which the town has repudiated and it is bound in good conscience to return it. (Pearson v. City of Seattle (Wash.), 44 Pac. 884; Scott v. New Castle (Ky.), 21 L. R. A. N. S. 112; Allsman v. City Okla. (Okla.), 17 A. & E. 184; Shue v. School Dist. No. 6 (Neb.), 152 N. W. 567; Hirn v. State of Ohio, 1 Ohio St. 15; City of Marshall v. Snediker, 78 A. D. 534; State v. Ritter (Wash.), 134 Pac. 493.) A license constitutes property (Fisher v. Cushman, 103 Fed. 860, 51 L. R. A. 292; Lyman v. Brewing Co. (N. Y.), 54 N. E. 577; In re. May, 5 Am. Bank Rep. 4). The licensee is entitled to recover (Scott v. New Castle, 21 L. R. A. N. S. 112; People v. Lyman, 55 N. Y. S. 76). Courts may inquire into the validity of a revocation order by collateral proceedings (Board of Com'rs v. State ex rel. Brown, 147 Ind. 476, 46 N. E. 908; Flournoy v. City of Jeffersonville, 17 Ind. 169, 79 Am. Dec. 468; Wilkins v. State, 113 Ind. 514, 16 N. E. 192; State v. Johnson, 105 Ind. 463, 5 N. E. 553; Mayor, etc., of City of Harvey v. Dean, et al., 62 Ill. App. 41). The functions of the board in granting or revoking a liquor license are ministerial (29 Cyc. 1443). The license was revoked without fault of the licensee, and the unearned portion should be refunded (Allsman v. Okla City, 16 L. R. A. N. S. 511, 95 Pac. 468).

Marion A. Kline and *Oscar O. Natwick,* for defendants in error.

The license was revoked on the ground that the holder was conducting a disorderly place (2836 C. S.). It was the duty of the board to revoke it under the statute (Bartlett v. R. R. Co., 71 N. E. 204); the order of revocation is not

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subject to collateral attack (San Mateo Co. v. Coburn, 63 Pac 78; Riverside Co. v. Mfg. Co., 86 Pac. 900; Donalson v. Lawson, 25 N. E. 903; Com. v. Wall, 145 Mass. 216). A license made subject to revocation by the passage of a prohibitory law does not justify recovery of the unearned portion by the licensee (Peyton v. Hot Springs County, 53 Ark. 236; Toman v. Westfield, 70 N. J. L. 610, 57 Atl. 125; McGinnis v. Medway, 176 Mass. 67; Fitzgerald v. Witchard, 130 Ga. 552, and cases cited. See also Wood v. School Dist., 115 N. W. 308). The case of Allsman v. Okla. City, cited by the plaintiff in error, is not to the point. It seems needless to cite further authority in view of the provisions of Chapter 13 of the Session Laws of 1911, expressly prohibiting the refunding of money paid to a municipality for liquor license. The license money was paid voluntarily with full knowledge of the provisions of the statute above referred to.

BLYDENBURGH, JUSTICE.

The plaintiff in error, plaintiff below, brought this case in the district court of Platte county to recover the sum of $926.05 from the defendant incorporated town of Guernsey, as the alleged unearned portion of a license fee paid for a license granted to the plaintiff by the Board of County Commissioners of Platte county to sell intoxicating liquor at retail at a designated place within the defendant town. An amended and substituted petition was filed by the plaintiff by leave of court, and a demurrer "That said petition does not state facts sufficient to constitute a cause of action against the defendant" and "that the facts stated in the petition are not sufficient to entitle plaintiff to the relief demanded in said petition or to any relief whatsoever," having been sustained by the court and the plaintiff declining to plead further, judgment was rendered against the plaintiff and her action dismissed, and seasonable exceptions having been taken by plaintiff the case is here on error alleged in sustaining the demurrer and rendering the judgment of dismissal.

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The sole question before this court is, does the amended and substituted petition state a cause of action against the defendant?

Said petition, in substance, alleges: That the defendant is an incorporated town situated in Platte county, Wyo.; that the Board of County Commissioners of Platte County, on proper application by plaintiff on June 5, 1916, licensed plaintiff to maintain and carry on the business of retail liquor dealer in a certain building in the defendant town in consideration of which license the plaintiff paid into the treasury of the defendant the sum of $1,000 as required by law. The license to run from Jan. 4, 1916, to Jan. 4, 1917. Said license being set out in full in the petition. That after, but not before, the issuance of the said license the plaintiff entered upon the business authorized by the license and in strict conformity therewith, and with the law applicable thereto, and continued to operate thereunder until the said permit was revoked by the said Board of County Commissioners, but not after the license was revoked. "That during all the time plaintiff operated under said permit she neither suffered nor permitted any disorder, disturbance of the public peace, drunkenness or unlawful games or practices or any violation of any law whatsoever in or about the house or place for which said license was granted aforesaid, but, on the other hand, plaintiff states that at all times subsequent to the granting of said permit aforesaid, plaintiff conducted said place in an orderly and lawful manner and strictly as required by law; and that subsequent to the granting of said permit she gave to said Board of County Commissioners no cause or reason or lawful excuse for the cancellation or revocation of said permit. Nor did any of her agents or employees give said Board any lawful reason or excuse or cause for the revocation of said permit, but on the other hand performed her duties in and about said place in strict accordance with law." That on Feb. 2, 1916, said Board of County Commissioners, no fault, cause or reason having been furnished therefor by the plaintiff or her agents, revoked the license and notified plaintiff that said revocation

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would become effective at 12 o'clock, midnight of Feb. 5, 1916, at which time plaintiff discontinued said business and ever since has ceased to operate under said license; that no previous notice was given plaintiff of the intention of the board to revoke said license or any opportunity to be heard thereon, and no objections or complaints as to plaintiff's conduct of the place were filed with the board or made against the plaintiff; that the board revoked said license "without any pretense of lawful reason or ground therefor existing or occurring at any time since the issuance of said permit;" that plaintiff at all times conducted a quiet and orderly place in strict compliance with law in every particular. That by reason of the action of the Board of County Commissioners plaintiff was denied the right to carry on said business subsequent to Feb. 5, 1916, "and without any fault on her part or any of her agents 305/365 of the consideration for said sum of $1,000 paid by plaintiff to the Treasurer of the Town of Guernsey for said license, to-wit: The sum of $926.05, has wholly failed and plaintiff received nothing whatever therefor; that said defendant is now wrongfully withholding from plaintiff said sum of $926.05 and refuses to return the same to plaintiff; and that said town of Guernsey aforesaid is therefore indebted to plaintiff in the sum of $926.05 with interest thereon from the sixth day of February, 1916." The petition then alleges that the $1,000 is still in the town treasury, having been ordered by the town council to be kept in a special fund to await the result of this action, and that plaintiff presented her verified claim as required by the statute to the town council for allowance and that said town council on November 9, 1916, rejected and refused to allow said claim.

The demurrer admits these facts as true for the purposes of this case, and the question to be decided is: Can one who has paid the required license fee into a city or town treasury for a liquor license granted by the Board of County Commissioners of the county, which has ceased to be effective through no fault of the person licensed, *and through no action or fault of the city or town or its officers,* recover

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an amount of the money paid proportional to the time during which the license was inoperative?

Under the laws of this state relating to the issuance of liquor licenses in force at the times mentioned in the petition in this case, the boards of the county commissioners of the several counties were the officers vested with the power to grant licenses to sell intoxicating liquors, but when granted the license fee or tax of $1,000 provided by statute for the yearly license was to be paid into the treasury of the city or town within which the place mentioned in the license was situated, and additional power was given to the municipality to regulate license or suppress the sale. This power was in some instances exercised by the town by enacting additional town licenses of a regulatory character, but as far as appears from the record before us, had not been taken advantage of in any way by the defendant town of Guernsey. That the power of the Board of County Commissioners to grant or refuse licenses was not one of unlimited discretion or to refuse without some cause based upon the qualifications of the applicant as indicated in the statute, this court decided in State v. Board of Commissioners of Platte County et al., 177 Pac. 131. The power of the Board to revoke licenses is contained in sections 2835 and 2836 of Wyoming Compiled Statutes, 1910, which are as follows:

Sec. 2835. "Whenever any person or persons, having a retail liquor license, shall suffer or permit any disorder, disturbance of the public peace, drunkenness, or unlawful games or practices, or violation of any law whatsoever, in his, her or their house or place for which such license shall be granted, such person or persons shall forfeit said license, and such license shall not be renewed for three months thereafter."

Sec. 2836. "Whenever it shall appear to the board of county commissioners that any person licensed as aforesaid is conducting a disorderly place it shall be within the power of, and further the duty of said board, by order duly made, to revoke said license, and in such case there shall be no rebate of the license fee of such persons."

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Under the maxim, *"Expressio unius est exclusio alterius"*, the power of revocation is limited to the causes stated in these statutes. (17 R. C. L. 555.) And what was said in the case of Pehrson v. City Council of City of Ephraim, 46 Pac. 657, on page 658, is applicable here: "If, then, those sitting to administer the law, upon lawful application therefor, can only refuse a license for cause, and must determine each case upon relevant facts, and exercise a sound discretion, can they revoke such license at mere will? Counsel for the appellant insists that section 2, above quoted, confers such power. We do not think this position tenable. Under such a construction the two sections would be in conflict with each other, or, rather, the effect and operation of the one would avoid and annul the effect and operation of the other, because, under the first section, upon application therefor, unless good cause existed for refusing, the license would have to be granted, and under the second it might be immediately revoked without cause. This would be unreasonable." It may therefore well be admitted that under the facts alleged here the action of the board of county commissioners in revoking the license was unwarranted and void. (23 Cyc., 156.)

But does that give the plaintiff the right to recover the money from the defendant town? By the weight of authority it is generally held that in the absence of statutory authority to refund, there can be no recovery of an unearned portion of a license fee from a municipal corporation. (23 Cyc., 153.) The reasons given for these decisions are that the payment is voluntary and under the well established principle of law, "That money paid voluntarily and with knowledge of the facts cannot be recovered and that this is especially true of money paid in the nature of taxes, even if the taxes are illegal." It is, however, claimed by the plaintiff that an action in the nature of assumpsit, such as the one at bar, "will lie whenever one has the money of another which he in equity and good conscience has no right to retain," and a number of cases are cited and quoted in the brief sustaining this principle as applied to cases where a

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license to sell liquor has been revoked, or failed for various causes. We think that all of these cases are distinguishable from the case at bar. In nearly all the decision is based on the fact that the license failed or was revoked by the act of the defendant city and the action is brought against the one who granted the license and received the money. In a number of the cases cited the courts based the decision on the fact that the money had been paid under mistake of either fact or law and could therefore be recovered. (Northrop's Executors v. Graves, 50 Am. Dec. 264; Ray v. New Castle (Ky.), 39 Am. Dec. 479; Scott v. New Castle (Ky.), 21 L. R. A. (N. S.) 112.)

The cases that hold a recovery can be had base the right on the principle that the defendant is wrongfully retaining money of the plaintiff, as stated in Soderberg v. King County, 15 Wash. 194, 55 Am. St. Rep. 878, 882, quoting from State v. St. Johnsbury, 59 Vt. 332, as follows: "When the fact is found that the defendant has the plaintiff's money, if he can show neither *legal nor equitable ground for keeping it*, the law creates the privity and the promise." The italics are ours. And the same case, quoting from Attorney General v. Perry, 2 Comyn, 481, states the rule as follows: "Whenever a man receives money belonging to another without any reason, authority, or consideration, an action lies against the receiver as for money received to the other's use; and this as well where the money is received through mistake, under color, and upon an apprehension, though a mistaken apprehension, of having good authority to receive it, as where it is received by imposition, fraud, or deceit in the receiver." The case at bar does not come under either of the alternatives of this rule. The money was not received under any mistake, either of law or fact, nor has the defendant done anything to nullify the consideration to the plaintiff and the defendant is entitled to retain it under, not only the permission, but the mandate of the statutes of the state, as we shall show further on.

The cases relied on by plaintiff are all primarily based on decisions of the Supreme Court of Nebraska, and the court

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of that state in later cases seems to doubt the correctness of its earlier decisions, while following them. In Chamberlain v. City of Tecumseh, 43 Neb. 221, 61 N. W. 632, referring to these Nebraska cases on this question, the Supreme Court of Nebraska says: "While each member of the court, as now constituted, entertains some doubt as to the soundness of the doctrine laid down in these cases, we do not feel justified in disturbing a rule which has been so long recognized and followed by the court. The right to recover unearned license money is settled by the above decisions, and, if a different rule is to be adopted, it must come through a legislative enactment." And in Wood v. School District No. 32 (Neb.), 115 N. W. 308, 15 L. R. A. (N. S.) 478, where the administrator of a deceased person sued to recover the unearned portion of a license fee rendered inoperative by the death of the licensee, that court said:

"Upon the oral argument, I was favorably impressed with this proposition, for the reason it seemed fair and just that the estate of a deceased person should recover unearned license money so long as it was impossible to continue the business under the license. But, upon further consideration, I am convinced that the law will not permit a recovery. The deceased paid the license fee voluntarily, and received all that the licensing board could give to him. The license was not rendered inoperative through any fault of the authorities. In the absence of a statute permitting it, the legal representatives of a deceased licensee cannot recover any part of the amount paid for the liquor license because of the latter's death before the expiration of the term of the license."

The case of Allsman v. Oklahoma City, 95 Pac. 468, 16 L. R. A. (N. S.) 511, is relied on generally as the leading case on this question of the right to a refund where prohibition has gone into effect, either locally or statewide, and thus the right to sell liquor has ceased before the expiration of the license. In that case the court founded its decision on the Nebraska cases, as from that "State the Territory of Oklahoma adopted its statutes regulating the license and sale of intoxicating liquors." The cases from the State of

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Washington are also strongly relied upon by plaintiff to support her contention. These cases are also based on the Nebraska cases and on the principle as stated in Pearson v. Seattle, 14 Wash. 438, 44 Pac. 884, as follows: "The respondent paid his money for a consideration which he has, in part, failed to receive, by reason of the act of the city. On the other hand, the city has received money for the granting of a privilege *which it has repudiated and annulled*. It is, therefore, in justice and equity, bound to repay it." Italics are ours.

The case of State v. Ritter (Wash.), 134 Pac. 492, was a case in which the license failed because the licensees were not citizens of the United States, and the City Council allowed a rebate and ordered a warrant drawn which the defendant, as Mayor, refused to sign, and mandamus was brought to compel him to do so. The court held that while the city might not be compelled to refund they had a right to compromise or settle disputed claims, and having ordered the warrant issued the Mayor should be compelled to sign it, saying: "Such repayment might not be compelled—that question is not before us—but the Council, if it sees fit, can return any money which has been paid under a mistake of law or fact, and to which it has no moral claim." And quotes with approval from Matthews v. Wesborough, 131 Mass. 521, as follows: "A vote to appropriate money for such a purpose is therefore binding upon them, even if upon subsequent examination it is ascertained that the claim which was to be settled thereby was one which could not have been successfully maintained." In Bart v. Pierce County (Wash.), 111 Pac. 582, while holding that "Syllabus '2': A municipality which has obtained money or property without authority of law must, under principles of natural justice, refund it to the true owner," but as ten per cent of the money had been paid by the county into the state treasury that could not be recovered, saying: "The fee was lawfully paid into the county treasury in the first instance, and in so far as it has passed beyond the control of the county authorities, in accordance with law, the county is not liable for its

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return. This is undoubtedly true of the 10 per cent of the fee paid over to the State Treasurer," and the decision is based on the Pearson case, *supra,* and the Nebraska cases. On the other hand, the cases holding against the right to recover in the absence of statutory authority authorizing it, are numerous, and in various ways state the rules applicable. In Phoebus v. Manhattan Social Club, 105 Va. 144, 8 Am. & Eng. Ann. Cases, 667, it is said: "In order for the plaintiff to maintain its action, it was necessary to show (1) that defendant had no authority to impose the tax; (2) that it actually received the money paid (this is conceded); and (3) that the payment was *not voluntarily made.*"

There is no question that the money was legally paid into the town treasury and the town, or its officers, have not done anything to render the license inoperative, as is said in Fitzgerald v. Witchard, 130 Ga. 552, 61 S. E. 227, 16 L. R. A. (N. S.) 519: "The agency which prevented the licensees from enjoying the privileges was the state law, separate and distinct from the municipal government. There is no more reason in equity and good conscience why the municipal authorities should be allowed to refund the money in this instance than there would have been had the licensee been prevented from enjoying the privileges of his license under some other independent agency over which the municipal government had no power or control."

In Peyton v. Hot Spring Co., 53 Ark. 236, 13 S. W. 764, the court said: "The payment of the license tax was legal, when made by appellant, and was voluntary on his part. If the effect of the judgment of the circuit court upon the petition for prohibition did not annul and revoke his license, he was not injured, and could not recover the amount paid therefor. If his license were annulled and revoked by said judgment, there is no authority in the statute for apportioning the amount of the license tax according to the time that appellant sold under the license. When the license was granted and accepted by him, the law authorized the county court, upon proper petition, to do what was afterwards done; and he is presumed to have known this, and to have

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taken the risk of this being done." And in McGinnis v. Medway, 176 Mass. 67, 57 N. E. 210, it is said: "The licensing board, whether a special commission, or the mayor and alderman, or the selectmen, do not act as the agents of the city or town, but as public officers specially designated in that behalf; and, in the absence of any statute to the contrary, the city or town is not answerable for their acts as such officers. The license is not granted by the city or town, but by the state, acting through its duly-appointed officers. It is to be noted that we are not dealing with a case where from its very inception the license was a nullity. These licenses were issued by the proper tribunal, acting within its jurisdiction, and having the power to issue them."

In Neumer v. Jackson County, 271 Mo. 594, the court, on page 600, said: "In order to recover from a municipal corporation a tax or fee paid to it involuntarily and under protest, one of the essential prerequisites (among others), of the right of recovery, absent a statutory rule to the contrary, is, that it must appear that the tax or fee was illegal. (4 Dillon on Municipal Corporations (5 Ed.), Sec. 1617; American Union Express Co. v. St. Joseph, 66 Mo. 675, 1 c. 683.)" And again, on page 601: "The Court of Appeals permitted a recovery from the city of Carthage for the amount represented by the unexpired portion of the license, on the theory that the city itself, by adopting the local option law, had made it impossible for the plaintiff to use his license. * * * In the present case, it does not appear that any act of the county or its voters prevented the appellant from having the full use of the license granted him." And the court held the petition did not therefore state a cause of action.

In the case of Smith v. Mayor and City of Toledo, 16 O. C. C. 362, the plaintiff sued both the mayor and the city to recover $100 as damages paid by him for a license which the mayor revoked without authority, as alleged, and ordered the policemen to prevent plaintiff from conducting the business licensed. A demurrer was interposed to an amended petition, as in this case, and the court said:

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"Now the question is—and the sole question: Do the facts stated in this petition constitute a cause of action against the defendants, or either of them? It will be observed that it is nowhere stated or claimed that the city, in any way, or any of its subordinates by virtue of the action of the council, or in any other manner, interfered with this business of the plaintiff in any particular; but the allegation is that it was the mayor, claiming to act in his official capacity as mayor of the city, who revoked the license and interfered, with the assistance of a policeman, in preventing the plaintiff from carrying on his business under the license.

"It appears to us, from the facts as stated, that the mayor had no power or authority to revoke that license. There is no provision of the ordinance cited whereby the mayor is invested with any such power. The council passed an ordinance authorizing the license to be given upon payment of the sum of one hundred dollars. The mayor was authorized to issue the license upon the payment of such sum; but it is nowhere provided that the mayor may revoke the license which he has given and forbid the plaintiff from carrying on his business. The council has not, in any manner, so far as this petition shows, taken steps in the premises; they have not, by resolution or otherwise, directed the police authorities nor the mayor of the city to interfere or interrupt or prevent the plaintiff from carrying on his business. * * * The petition, therefore, shows no cause of action against the city, as it appears to us, and the demurrer of the city therefore, for that reason if for no other, was properly sustained.

"Now, as to the mayor himself; the proceeding being brought for the purpose of recovering from the mayor the sum of money which had been paid for the license and which he had paid into the treasury of the city, it shows no cause of action against the mayor. The mayor is authorized to issue the license, upon payment of a certain sum of money. It appears from the petition that the money has been paid and the license has been issued, and the mayor has paid the money into the treasury of the city. He has not got the

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money, and he is not responsible for it. He cannot be called upon to return the money which has been paid for the license."

But the decision in this case might well be based on our statutes alone. Those applicable are sections 2835 and 2836, above quoted, and section 2826, which reads as follows:

"All licenses issued by any county in this state for the sale of liquors, or for owning or keeping a billiard table, or any table used for pool or bagatelle, and all licenses issued by said counties for any other game or games, not prohibited by the laws of this state, when the licensee shall be a resident of and carrying on the business for which he is licensed within the corporate limits of any incorporated town, city or village, the license shall be collected by the city marshal or collecting officers of such incorporated town, city or village, for the purposes mentioned in this chapter. It shall be the duty of such collecting officer, between the first and fifteenth days of each month, to pay into the treasury of such incorporated town, city or village, all moneys collected for such licenses, which moneys shall be applied to the general revenue purposes of such incorporated town, city or village."

Also Section 1, Chap. 13, Session Laws of 1911, as follows:

"That in all cases where a retail liquor license has been duly and legally issued and the license money fully paid into the treasury of any city or town of this state, and the said owner of such license having sold in good faith to a purchaser such saloon business, and a new license issued by any county, city or town for the carrying on and continuance of such saloon business, then and in that case, the authorities of such city or town shall credit upon such new license the unused portion of the license so belonging to the vender of such saloon business, and the purchaser of such business shall pay into the treasury of such city or town the remaining portion of such new license, and *no license money paid to any city or town for any liquor license shall be refunded* to any licensee." Italics are ours.

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It is evident that the legislatures did not intend that any moneys paid for liquor license should ever be paid back and plaintiff paid the money in face of, and with knowledge of, these statutory provisions. As the authorities hold that voluntary payments cannot be recovered in absence of statutory authority, how much more is this true under the mandatory provision of our statutes against repayment. It is sometimes argued that liquor license fees are for regulation and not revenue and therefore are not governed by the rule as to no recovery of money paid as taxes, and while licenses to sell intoxicating liquor are generally for the purpose of regulation, they are also often for revenue as well, and in this state as to the cities and towns the county license fee is paid to the town as revenue simply, as is expressed in section 2826, Compiled Statutes, 1910, *supra*. "A construction of a statute by the legislature as indicated by the language of subsequent enactment is entitled to great weight." (36 Cyc., 1142.) That the last legislature of this state construed these statutes as prohibiting the return of any license fees by cities is shown by the fact that after enacting a statutory prohibition law to take effect after June 30, 1919, it enacted a statute permitting the cities and towns to refund the unearned portion of the license fee after prohibition went into effect. Section 1 of Chapter 100, Session Laws of 1919, is as follows:

"That whenever it shall become unlawful by reason of any United States law, or by reason of any State law, for any person, persons, company or corporation to be engaged in the retail liquor business in the State of Wyoming before the expiration of the full period for which a license authorizing the sale of liquors, wines and beers shall have been issued, as provided by Section 2832 of Chapter 10, Wyoming Compiled Statutes of 1910, as amended by Section 1 of the Session Laws of the year 1917, or, as provided by any other existing law of the State of Wyoming, the Board of County Commissioners of the respective counties in the State of Wyoming, and the City Commissioners and City Councils of any incorporated city in the State of Wyoming, who

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may have issued such license, may refund to the person, persons, company or corporation who have paid the full license money, provided by law, such an amount of such license money paid as will cover the period of time, when by the laws of the United States or of the State of Wyoming, it shall have become unlawful for any person, persons, company or corporation, to be engaged in the retail liquor business in the State of Wyoming."

We hold that under our laws as they existed at the times mentioned in the amended petition there could be no recovery from a city or town of any portion of a liquor license fee paid for a license granted by the board of county commissioners of the county wherein such city or town was situated, the defendant city or town or its officers not having done anything to nullify the license. That the demurrer to the amended and substituted petition was properly sustained; that no error was committed by the lower court, and that the judgment is in all things affirmed. *Affirmed.*

BEARD, C. J., and POTTER, J., concur.

BURLEY-WINTER POTTERY CO. v. ONKEN BROS. & WEST CO.

(No. 924; Decided Sept. 22, 1919; 183 Pac. 747.)

FRAUDS, STATUTE—SUFFICIENCY OF MEMORANDUM OF SALE.

1. A memorandum of sale which does not satisfy the statute of frauds, is inadmissible in evidence in an action for breach of a sales contract.
2. A memorandum of sale in order to satisfy the statute of frauds, must contain the substantial terms of the contract, expressed with such certainty that they may be understood from the contract itself, or some other writing to which it refers, without resorting to parol evidence, and when reference is made in the memorandum to another writing, it must be so clear as to prevent the possibility of one paper being substituted for another.
3. A sales order describing the subject matter of the contract as "1 car stoneware as per orders shown for same" is too

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indefinite to fulfill the requirements of the statute of frauds, and was properly excluded from evidence.

APPEAL from District Court, Sheridan County; HON. JAMES H. BURGESS, Judge.

Action by Burley-Winter Pottery Co. against Onken Bros. & West Co. There was a judgment for defendant and plaintiff appeals. Material facts are stated in the opinion.

Metz and Sackett, for appellant.

The defense was the statute of frauds (3752 C. S.); objection was made to the introduction of a memorandum of sale on the ground of uncertainty; parol evidence is admissible to ascertain the nature and quality of the subject matter of sale (Greenleaf 288; Hurley S. Brown, 98 Mass. 545; Haskell Tukesberry, 92 Me. 551; Henderson v. Coleman, 19 Wyo. 183). Evidence that a named person was in charge of and conducting a business is competent to show agency. The memorandum offered is sufficient (Colrick v. Hopper, 3 Ind. 348.) Evidence was admissible to complete the description (Howard v. Adkins, 167 Ind. 184; 78 N. E. 665).

Lonabaugh and Wenzell, for respondent.

The memorandum of sale was clearly insufficient to satisfy the statute of frauds; a sale memorandum must contain the essential details, which are: 1st, the parties; 2nd, the subject matter; 3rd, the agreement on both sides; and, 4th, the price (Taylor v. Scott Co., 178 Ill. App. 487; Selvage v. Talbot, 33 L. R. A. N. S. 973, 20 Cyc. 258; Grafton v. Cummings, 99 U. S. 100; Watt v. Cranberry Co., 18 N. W. 898; Paul v. Graham, 160 N. W. 616; Kling v. Borden, 61 N. E. 148). There was no evidence of delivery. The second cause of action is for prepaid freight, but there is no evidence that defendant ever requested anyone to pay freight. No one can create himself a creditor of another by the unsolicited payment of a debt (Elliott Cont. 677). Every person is bound at his peril to ascertain the authority of an agent he deals with (2nd Meacham on Agency, 1721).

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The authorities cited by appellant are not in point, being from the states of Maine and Indiana, and decided under statutes differing from Wyoming.

BEARD, CHIEF JUSTICE.

In this case the appellant was plaintiff, and the respondent was defendant in the district court, and will be referred to as plaintiff and defendant. The plaintiff in its amended petition, for a first cause of action, after alleging the corporate capacity of each of the parties, alleged in substance and effect that it was engaged in the manufacture and sale of crockery, pottery, glassware, and other articles of like character, in the city of Crooksville, State of Ohio. That on or about April 7, 1914, it sold and delivered to the defendant at defendant's request certain articles of merchandise and other property, at the agreed price of $278.50. In the petition was set out an itemized account of goods amounting to $284.25, followed as follows:

"Less ¼c per gallon on 4987 gallons.....	$12.47	
Less 10% on $32.63 Specialties.....	3.28	$ 15.75
		$268.50
Two stop-off charges prepaid.....		10.00
		$278.50"

That defendant promised and agreed to pay for said merchandise within a reasonable time after delivery thereof; that said reasonable time had long since expired and said defendant had not paid the same or any part thereof.

For a second cause of action it alleged, that defendant purchased and plaintiff delivered the merchandise set forth in the first cause of action, at which time the plaintiff, at defendant's request, shipped said goods to defendant, by freight, from Crooksville, Ohio, to the towns of Riverton and Lander, Wyoming; that defendant agreed to pay plaintiff the freight charges upon said goods, in the sum of $589.58, within a reasonable time after said shipment was made; that plaintiff, at defendant's request, prepaid said

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freight in said sum; that defendant had refused and neglected to pay the same. Plaintiff prayed judgment for $868.08, with interest from May 1, 1918, at 8% per annum.

For answer, defendant denied each and every allegation contained in said petition, except that defendant was a corporation.

For a second defense, defendant pleaded certain new matter, which was denied by the reply. But, as the defendant introduced no evidence, that issue is not in the case here.

It is conceded that the first cause of action comes within the statute of frauds, which reads as follows: "Any contract for the sale of goods, chattels or things in action for the price of fifty dollars or more, shall be void, unless: First—A note or memorandum of such contract be made in writing and be subscribed by the party to be charged thereby; or, Second—Unless the buyer shall accept and receive part of such goods, or the evidences, or some of them, of such things in action; or, Third—Unless the buyer shall at the time pay some part of the purchase money." The plaintiff offered in evidence a written order in words and figures as follows:

"Onken Bros. & West Co., Inc.
"Wholesale Grocers
"Sheridan and Casper, Wyoming.

"Burley & Winter Pottery Co.,
"Crooksville, Ohio.

"Please Enter Our Order as Follows:

"Ship to Sheehan & Fisher At Lander, Wyo.
Via C. & N. W. R. R. F. O. B. Crooksville, Ohio.
On all Shipments forward original invoice and bill of lading to Sheridan and Duplicate to Casper

Amount	Size	Article	Price Quoted
1	Car	Stoneware as per orders shown for same. at ¼ct per gal. less than Prices sold at.	

"Onken Bros. & West Co.,
"Successors to J. E. West Co., Inc.
"Per E. W. Elder."

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Defendant objected to the introduction of the order for the reasons, 1, "That it is not shown that the person signing the same had any authority to give the order. 2, That the alleged order is void for uncertainty, and is incompetent, irrelevant and immaterial. 3, That the alleged order wholly fails to disclose the price at which the goods pretended to be described therein are to be sold. 4, The said order wholly fails to describe the subject matter thereof in that there is no sufficient description of the goods sold. 5, The order is void under the Statute of Frauds for the reason that the value of the goods exceeds fifty dollars."

The court reserved its ruling on the objections until the close of plaintiff's evidence, whereupon the defendant moved the court to dismiss the action on numerous grounds, the substance of which were, that no valid contract of sale was proven; that there was no evidence of a delivery of the goods, and that the order offered in evidence was void for insufficiency of description of the goods; no price stated; that the evidence disclosed that the order did not contain all of the contract and that the contract in question was for the sale of goods of the value of more than fifty dollars. The court sustained the objection to the introduction of the order offered in evidence, and sustained the motion to dismiss the action and rendered judgment against plaintiff for costs. Plaintiff appeals.

If the order which plaintiff offered in evidence was not such a memorandum of the contract as required by the statute of frauds, its exclusion by the court was correct, and the judgment should be affirmed. The correct rule for the construction of such memorandum, as we understand it to be, is well stated in Waul v. Kirkman, 27 Miss. 823, where it is stated: "The rule upon this point is well settled to be that the memorandum, in order to satisfy the statute, must contain the substantial terms of the contract, expressed with such certainty that they may be understood from the contract itself, or some other writing to which it refers, without resorting to parol evidence. * * * And when reference is made in the memorandum to another writing, it

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must be so clear as to prevent the possibility of one paper being substituted for another." See also Willis v. Ellis, 98 Miss. 197, 53 So. 498, 1913 Ann. Cas. 1039; Wineburgh v. Gay, 27 Cal. App. 603, 150 Pac. 1003, and cases cited in the opinion; Cushing et al. v. Monarch Timber Co., 75 Wash. 678, 135 Pac. 660, 1914C, Ann. Cas. 1239; Campbell et al. v. Weston Basket & Barrel Co., 87 Wash. 73, 151 Pac. 103; Solomon v. McRae, 9 Colo. App. 23, 47 Pac. 409. In 20 Cyc. 258, the rule is stated: "In order to render an oral contract falling within the scope of the statute of frauds enforceable by action, the memorandum thereof must state the contract with such certainty that its essentials can be known from the memorandum itself, or by reference contained in it to some other writing, without recourse to parol proof to support them." A long list of authorities will be found in the notes to that statement of the rule. In the case at bar the description of the subject matter of the contract is too indefinite to fulfill the requirements of the statute. "1 Car Stoneware", may mean any kind or several kinds of stoneware, and the property could not be identified without other evidence. Nor does the additional statement, "as per orders shown for same", render the description of the property any more definite. The names of the parties giving the orders are not stated; but if that had been done, the orders referred to were not offered in evidence. The order offered in evidence not being such a memorandum as is required by the statute, it was properly excluded. In addition to the insufficiency of the memorandum, there was no competent evidence of a delivery. The only evidence of a delivery was the testimony of the salesman who took the order that to the best of his knowledge the goods, the carload, was shipped according to the orders he had taken. But he admitted he had no personal knowledge of the shipment; was not present, and, in fact, knew nothing about the shipment.

As to the second cause of action, there was no competent evidence of the payment of any freight by the plaintiff. The evidence offered on that branch of the case being the same as on the question of delivery. The plaintiff having failed to

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prove its case by competent evidence, the judgment is affirmed. *Affirmed.*

POTTER and BLYDENBURGH, JJ., concur.

JONES v. STATE.

(No. 935; Decided Sept. 29, 1919; 183 Pac. 745.)

CRIMINAL LAW—LARCENY—INSUFFICIENT EVIDENCE TO SUSTAIN CONVICTION—NEWLY DISCOVERED EVIDENCE—DILIGENCE.

1. Where the only evidence in a prosecution for larceny on which the jury could rightfully find the defendant guilty, was the testimony of a witness who had himself been convicted of the larceny of a horse upon a plea of guilty, and was under sentence at the time, whose story was improbable and contradicted by several witnesses on material matters, held, insufficient to sustain a conviction.
2. In a prosecution for larceny, the testimony of one who had purchased the stolen horse, to the effect that he had bought it from the prosecuting witness, and not from the defendant, was material, but not sufficient to require a new trial as newly discovered evidence, there appearing a lack of diligence on the part of the defendant to procure it.

ERROR to District Court, Laramie County; HON. WILLIAM C. MENTZER, Judge.

William L. Jones was convicted of larceny and brings error. The material facts are stated in the opinion.

H. Donzelman, for plaintiff in error.

The evidence is insufficient to sustain conviction; the only evidence upon which the jury could find the verdict of guilty is the testimony of one Bush, who stood in the relation of an accomplice, and whose testimony was not corroborated (Stone v. State, 118 Ga., 705; Kelly v. People, 192 Ill., 119; Com. v. Scott, 123 Mass. 222; State v. Kubbman, 152 Mo. 100; People v. Hare, 57 Mich. 505; People v. O'Neil, 109 N. Y. 251; Ayers v. State, 88 Ind. 275; People v. Mimi, 120 Mich. 530; U. S. v. Smith, 27 Fed. Cases No. 16322;

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U. S. v. McKee, 26 Fed. Cases, No. 15685). He admitted participation in the theft and must be considered an accomplice (Bauer's Law & Collection Co. v. Bradbury, 84 Pac. 1007; Campbell v. Campbell, 120 Iowa 317; Wingen v. May, 99 Mo. 809). His testimony was contradicted by several witnesses as to material matters; he was at the time under sentence for conviction on a horse stealing charge on a plea of guilty; he was shown to be of bad character and undeserving of belief. The testimony of Frank Sinon should have been excluded.

The testimony of Frank Sinon was a matter of surprise that ordinary prudence could not have guarded against, and a motion for new trial should have been granted on that ground (Blackburn v. Crowder, 110 Ind. 127). A new trial should have been granted on the ground of newly discovered evidence (State v. Albert, 114 La. 70, and cases cited). The verdict is unsupported by sufficient evidence.

W. L. Walls, Attorney General; T. Paul Wilcox, Deputy Attorney General; L. C. Sampson and *Sam M. Thompson,* for defendant in error.

There is no statutory requirement in this state that the testimony of an accomplice shall be corroborated in order to sustain conviction; under the common law a conviction upon the uncorroborated testimony of an accomplice will stand, if it satisfies the jury of the guilt of the accused beyond a reasonable doubt (Crawford v. State, Tex. 34 S. W. 927; Armstrong v. State, 26 S. W. 829-830, 33 Texas Cr. Rep. 417; Walker v. State, Tex. 37 S. W. 423; Anderson v. State, 45 S. W. 15, 39 Texas Cr. Rep. 83; Harris v. State, 75 Tenn. 124, 126). The assignment of error on the ground of accident and surprise was addressed to the discretion of the trial court and the ruling thereon is not reviewable (Cross v. People, 47 Ill. 152, 158, 95 Am. Dec. 474; In re. Rowe U. S. 77 Fed. 161, 165, 23 C. C. A. 103; Polk v. State, 36 Ark. 117, 126; Miller v. Commonwealth, 78 Ky. 15, 22, 39 Am. Rep. 194; Barrara v. State, 42 Texas 260, 263; Moynahan v. People, 167 Pac. Rep. 1175, 1176).

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There was no error in refusing a new trial on the ground of newly discovered evidence, it not appearing that defendant used diligence to procure the same, prior to the trial (Talbot v. McDougall, 3 Upper Canada Queens Bench Rep., Old Series, p. 644; Seward v. Cease, 50 Ill. 228; Bender v. Keil, 34 Misc. N. Y. 395, 69 N. Y. Sup. 655).

BEARD, CHIEF JUSTICE.

The plaintiff in error, William L. Jones, was convicted of the crime of larceny and sentenced to a term in the penitentiary. From that judgment he brings the case to this court by proceedings in error.

The errors assigned are: 1. Insufficiency of the evidence to support the verdict and judgment. 2. Newly discovered evidence.

The property alleged to have been stolen was a certain gray mare, the property of Wesley Kelly. The evidence discloses that the mare was put in the barn of Kelly, situated a little more than a mile from the town of Pine Bluffs, where Kelly resided, about 5:30 or 6 o'clock on the evening of November 21, 1916, and disappeared therefrom some time between that hour and the next morning. The only evidence in the record tending to connect Jones with the larceny is the testimony of one Bush, a witness for the prosecution, a young man about twenty-one years of age at the time of the trial, who had theretofore been convicted of the larceny of a horse upon a plea of guilty, and was at the time of the trial under sentence therefor in the industrial institute in this state, and who admitted that he had stolen other horses. His testimony was to the effect and substantially as follows: That he went to the ranch of Jones, which is about twenty-two miles from Pine Bluffs, on the evening of November 20, 1916, for the purpose of going to work for Jones. On the next day he accompanied Jones to Pine Bluffs with a load of wheat, where they arrived in the evening about five o'clock, unloaded the wheat at the elevator, put up the team in Anderson's livery barn and went together to supper about seven o'clock. After supper went to Robinson's store, re-

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mained there about an hour, saw Mr. Hastings, Mr. Jones and Mr. Bloom there. Went from there to Johnston's store, where Jones and Hastings came in, was there probably twenty minutes and went out with Hastings and Jones. Went with them to MacSheedy's, was there fifteen or twenty minutes. Went from there with Hastings and Jones to Simon & Sellers' saloon, was there a short time, went from there to the drug store, then back to the saloon. Saw Jones and Hastings there. Stayed there a few minutes. Went to Anderson's livery barn. Jones and Bloom were there. Was there a few minutes and went back to saloon, where Jones came in later. Jones motioned to me to follow him outside. Hastings went out at same time. Hastings, Jones and I went to Anderson's livery barn. Jones said he wanted to give Hastings the slip. Jones and I went to Bloom's barn. Found Bloom there. On the way down Mr. Jones had told me he had a horse down at Frank Bloom's barn he wanted me to ride out to his place. I told him all right, so we went into Frank Bloom's barn and he pointed the horse out. The horse was already saddled and bridled, and he said: There is the horse. They told me to be careful of this horse, that he hadn't been ridden much. Jones told me that, and also gave me instructions not to tie my reins together, so if she got away and throwed me or anything I could catch her again, and Bloom spoke up and told Jones to tell me to go out the State line road, and I didn't do it. It must have been about eleven o'clock. (On cross-examination he said 10:30.) That he led the horse out in the street, got on it and rode out to Jones' place, arriving about four o'clock in the morning, put the horse in the barn, fed it, talked with Mrs. Jones, who was in bed. Jones came home about five o'clock in the evening. He told me Wesley Kelly was looking for this mare, that he had been down past Frank Bloom's place with a car, and that he had to get her out of there that night; that Kelly might be out there the next morning. After he put his team away and got supper, he saddled his horse and gave me instructions to saddle my horse. He said it would be best for me to go along, as they

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might come looking for me. He told me it was Kelly's mare. Jones led the Kelly mare and rode one of his, and I came along behind on a horse of mine, and we went north and east about forty miles across country until about two o'clock the following morning. Jones left me in the pasture there, said he would ride down to the house and see if this fellow was there, where he was going, came back and said it was all right. We took the mare down and put her in the barn. A fellow by the name of Nelson came out and Jones introduced me to Nelson. We went in the house and Nelson got Jones and I a bite to eat and some coffee. We sat there and talked quite a while. I went to bed and Jones and Nelson sat up and talked. Jones came in while I was asleep and we slept together. We got up the next morning about the same time, about eight or nine o'clock. Jones planned to go home in the afternoon and instructed me to stay until the following morning and drive a cow home, which he had bought down there, which I did, arriving at Jones' ranch about five o'clock in the evening.

The foregoing is the substance of all the testimony of the witness Bush tending to connect Jones with the larceny. Jones testified, in substance, that Bush accompanied him to Pine Bluffs with the load of wheat; that they arrived there in the evening, had supper together, that he was at several places in the town with him during the evening up to about 9:30 o'clock, at which time he went to the hotel kept by Beaver, and went to bed there about 10 o'clock that evening. In that statement he was corroborated by Beaver, who testified that Jones went to bed about ten or between 10 and 11 o'clock. Jones denied being with Bush after about 9:30 o'clock, denied being with him or Bloom at Bloom's barn, or that any such conversation as related by Bush as taking place at the barn was had. Denied being at Bloom's barn that evening. Stated that he went to Anderson's livery barn to attend to his team before going to the hotel, and that Bush did not go with him. Denied being at the saloon. Hastings testified that Jones and Bush were at the saloon and that the three went to Anderson's barn about 11 o'clock,

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and that he did not see them later. Bloom testified that he was not at his barn that evening with either Bush or Jones; that he left Jones on the street about 9:30 o'clock and went home and was not out again that night. That neither Bush nor Jones were at his barn that evening to his knowledge. That Bush told him he was going to Cheyenne on the train, No. 17, that night. (It appears from other testimony that No. 17 was due in Pine Bluffs at 10:10 p. m.) Mrs. Bloom testified that her husband came in about 9:30, or a few minutes thereafter, and went to bed about 10 o'clock. Jones further testified that Bush told him on the way to town that he was going out in the country that evening to a party, and later that he was going to Cheyenne. That he went home the next day, arriving there in the evening, and that Bush was not there. That he started to Nelson's alone the next morning for a cow which he had bought at a sale; that he overtook Bush about a mile or mile and a half from Nelson's riding a gray mare and asked him where was going, and he replied: "To Nelson's." That he had never seen this gray mare before that time and did not know to whom she belonged. That he was going right back home, and Bush said: "If you want to go back, I will drive the cow back for you tomorrow," which he did. That Nelson's place is about twenty-five miles from his place. Mrs. Jones testified that Bush was not at the Jones' place after he left to go to Pine Bluffs on November 21st, until he returned with the cow on the 24th; that Jones started for the cow in the morning about 7 or 7:30 o'clock, and that one Verne Seguine was there at that time. Seguine testified that he was at the Jones' place on the morning Jones started for the cow; that there was no one with Jones, and that he did not see Bush there at that time. W. A. Sherrill, who resided at Crawford, Nebraska, testified that he bought the mare from Nelson at Crawford; and that she was claimed and taken from him by Kelly.

We have set out at considerable length the material testimony in the case, as this court has always followed the rule that it will not reverse a judgment on the ground of the in-

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sufficiency of the evidence to support the verdict of a jury, or the findings of the trial court, if there is in the record substantial credible evidence to support it. But in the present case the only evidence upon which the jury could rightfully find the defendant guilty was the testimony of the witness Bush. Considering the character of that witness, the improbability of his story and the fact that he was directly contradicted by so many witnesses on material matters, forces one to the conclusion that his evidence is neither substantial nor credible. The animal was stolen from a barn a mile or more away from the town of Pine Bluffs, where the owner lived and was engaged in business, sometime during the night of November 21, 1916; and according to Bush's testimony it must have been before 10:30 on that evening. It is highly improbable that a thief at that time of night would take the stolen animal to a small town where the owner lived, and while business places were open and people were on the streets. There is no evidence that Jones was at Kelly's barn that night, or was out of Pine Bluffs.

The material evidence, claimed to be newly discovered, consists of the evidence of the man Nelson mentioned by the witnesses. In his affidavit attached to the motion for a new trial, he states, in substance, that on the afternoon or evening of November 23, 1916, John Bush came to his home and had with him two horses, one a gray mare. That Bush remained there that night, and the next morning Bush wanted to trade the mare to him, but no trade was made. That Bush then wanted to sell the mare to him and that he then bought the mare from Bush for fifty dollars. That he never purchased any horse or mare from William L. Jones, the defendant. That this was the same gray mare he took to Crawford, Nebraska, and sold there. That evidence was material; but, according to Jones' own testimony, he knew Bush was at Nelson's with this mare on Nov. 23; and there is no sufficient showing in the record of reasonable diligence to procure it and present it at the trial.

Reluctant as appellate courts are to set aside the verdict of a jury, a careful consideration of all of the evidence in

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this case satisfies us that it is one of the few cases which comes within the exception to the general rule, and that there is not in this record sufficient substantial credible evidence to support the verdict and judgment. For that reason the judgment of the district court is reversed and the cause remanded for further proceedings according to law.

Reversed.

POTTER, J., and BURGESS, DISTRICT JUDGE, concur.

BLYDENBURGH, J., being unable to sit, HON. JAMES H. BURGESS, Judge of the Fourth Judicial District, was called in and sat in his stead.

STATE v. CAREY.

(No. 950; Decided Sept. 29th, 1919; 183 Pac. 785.)

PUBLIC LANDS—PURCHASER FROM THE STATE MUST PAY PRIOR LESSEE FOR WATER IMPROVEMENTS—CONSTRUCTION OF STATUTES—IMPLIED REPEAL.

1. To justify the presumption of an intent to repeal one statute by the enactment of another, either the two statutes must be irreconcilable, or the intent to effect a repeal must be otherwise clearly expressed.
2. Where two legislative acts are repugnant to, or in conflict with each other, the one last passed, being the latest expression of the legislative will, must govern although it contains no repealing clause.
3. A purchaser of school land from the state is obliged to pay a prior lessee the appraised value of irrigation ditches made thereon, and water rights acquired therefor by such lessee. The provisions of Compiled Statutes of 1910, Section 632, are controlling.

ORIGINAL PROCEEDINGS IN MANDAMUS on the relation of A. H. Marble against Robert D. Carey, Governor, and others comprising the State Board of Land Commissioners.

Clark and Haggard, for relator.

The rights of the original lessee are governed by the provisions of Sec. 632, C. S.; the provisions of Sec. 616, C. S.,

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while in conflict, were apparently repealed by implication; at any rate, Sec. 632 is the more recent expression of the legislature on the subject, and should govern; the presumption of repeal is supported by the legislative history of the two sections, when considered in connection with other sections of the state land laws, bearing a relation to both. Sec. 616 may remain in force and effect for certain purposes; for example, in cases where the original lessee has reclaimed more than one quarter of the land, thus acquiring a right to successive leases, for a period of 25 years, at the end of which time the water rights and improvements should revert to the state; the purchaser having complied with the statute, Sec. 632 C. S., is entitled to a certificate of purchase.

D. A. Preston, Attorney General, for defendant.

Educational lands may be leased for periods not exceeding five years; water rights acquired by the original lessee become the property of the state at the expiration of the first five year lease, under the provision of Sec. 616 C. S., and the same rule should be applied at the expiration of each succeeding five year lease term; water rights thus acquired by the state could not be impaired by the subsequent enactment of Sec. 632 C. S.

Clark and Haggard, for relator, in reply.

If the leases upon which the provisions of Section 616 are founded could not be lawfully given, and the preferential right to renewals be void, there could be no transfer of water rights growing out of a transaction under a void statute. The contention that Sec. 632 cannot be given retroactive effect, so as to apply to a lease granted prior to its enactment, is not supported by the authorities, since Sec. 632 is a repealing act (36 Cyc. 1224). Occupying claimant or betterment acts may operate retrospectively (22 Cyc. 15; Beard v. Dansby, 48 Ark. 183, 2 S. W. 701; Fee v. Coudry, 45 Ark. 410; Claypool v. King, 21 Kan. 602; Whittney v. Richardson, 31 Ver. 300; Mills v. Geer, 111 Ga. 275, 52 L. R. A. 934.

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BEARD, CHIEF JUSTICE.

This is an application to this court by the relator for a writ of mandamus requiring the defendants to issue to him a certificate of purchase for Section 16, Tp. 21 N., R. 66 W., in Platte county. The case was commenced while the predecessors of the above named defendants were in office, and during the pendency of the action the present officers were, duly, by order of court, substituted as defendants. The case has been submitted on a general demurrer to the petition, and presents the single question of law, viz: Is the purchaser of school lands from the state required to pay to the lessee of said lands the appraised value of irrigation ditches constructed by said lessee, and water rights acquired by him during the period of his lease or leases for the irrigation of less than one fourth of said land, or must said purchaser pay said appraised value to the state? The relator paid to the proper state officer the first payment required at the time of the sale and purchase of the land, and paid to the lessee or lessees the appraised value of the ditches which had been constructed thereon and the water acquired by them during the terms of their leases, and delivered to the proper officer the receipts of the said lessees for such payments and demanded that a certificate of purchase for said lands be issued to him. This the defendants refused, claiming that the state was entitled, and not the lessees, to the appraised value of said ditches and water rights.

The provisions of the statutes which we are required to construe and apply are Sections 616 and 632, Compiled Statutes, 1910, which read as follows:

"Sec. 616. All water rights which shall have become appurtenant to the lands leased aforesaid shall, upon the expiration of the leases given to the lessee who made the irrigation and improvements thereon, become the property of the state, and shall not be considered as being improvements, which any subsequent lessee or purchaser thereof shall be obliged to reimburse or pay such original lessee who made such improvements thereon."

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"Sec. 632. If any state lands be sold upon which surface improvements, including irrigation works of any kind, have been made by a lessee, or for which water rights or proportionate interests in irrigation reservoirs, canals or systems, have been acquired, said improvements, irrigation works and water rights shall be appraised under the direction of the board. The purchaser of said lands, upon which improvements and irrigation works have been made, or for which water rights have been acquired as herein provided for, shall pay the owner of such improvements, irrigation works or water rights, as the case may be, the appraised value thereof, and take a receipt therefor, and shall deliver the same to the commissioner of public lands before he shall receive a patent or certificate of purchase. All such receipts shall be filed and preserved in the office of the commissioner of public lands."

If both of those sections of the statute were in force at the time of the transaction in question, which was February, 1917, there is at least an apparent conflict between them. Section 616 was originally Section 24 of Chapter 79, Session Laws of 1890-91, and has remained unamended or directly repealed to the present time. Section 632 was likewise originally section 32 of the same chapter of the laws of 1890-91. That section as originally enacted and as it remained until amended and re-enacted read as follows: "If any state lands be sold upon which surface improvements have been made by a lessee (except irrigating ditches and irrigation works), said improvements shall be appraised under the direction of the board. The purchaser of state lands upon which improvements have been made, as herein provided for, shall pay the owner of such improvements the appraised value thereof, shall take a receipt therefor, and shall deliver the same to the register before he shall receive a patent or certificate of purchase. All such receipts shall be filed and preserved in the office of the register."

Thus the law remained until 1909. By section 2 of Chapter 132, Session Laws of 1909, the last above quoted section was amended so as to read as it now appears as section 632

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of the Compiled Statutes of 1910, as above set out. By omitting from the section, as originally enacted, the exception of "irrigating ditches and irrigation works," and inserting in lieu thereof the words "including irrigation works of any kind," it seems clear that it was the intention of the legislature to include irrigation works and water rights in the improvements to be paid for by the purchaser to the lessee who had constructed and acquired the same. Prior to the amendment of 1909, surface improvements, other than irrigating ditches and irrigation works, were required to be appraised and the purchaser was required to pay the owner of such improvements the appraised value thereof. By the amendment the improvements which are required to be appraised include not only those mentioned in the original act but also irrigation works and water rights, and no provision is made for a separate appraisement of the different kinds of improvements, and all are to be paid for by the purchaser, to the owner, and receipts for such payment delivered to the commissioner of public lands before the purchaser shall receive a patent or certificate of purchase. Those requirements that the appraisement of improvements shall include irrigation works and water rights add to the force of the plain language of the statute, and renders it certain that the legislature intended thereby to place irrigation works and water rights on exactly the same footing and in the same situation with respect to payment therefor as other surface improvements placed upon the land by the lessee. There is, therefore, such repugnance or conflict between the provisions of sections 616 and 632, Compiled Statutes of 1910, that they cannot be harmonized or reconciled. Repeals of statutes by implication are not favored; and as stated in 36 Cyc. 1072, "To justify the presumption of an intent to repeal one statute by another, either the two statutes must be irreconcilable, or the intent to effect a repeal must be otherwise clearly expressed." In the present case we find not only that the two statutes are irreconcilable, but also, as we think, a clearly expressed intent by the legislature to substitute the provisions of the later act for

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those of the former. It is also said in the work last above cited, on page 1073, "Where two legislative acts are repugnant to, or in conflict with, each other, the one last passed, being the latest expression of the legislative will, must govern, although it contains no repealing clause." That rule is so well established that it requires no further citation of authorities to support it. We are, therefore, of the opinion that the provisions of section 632, Compiled Statutes, 1910, govern this case, and that the relator is entitled to a certificate of purchase for said lands, and that it is the duty of the defendants to issue and deliver to him such certificate of purchase. A writ of mandamus will issue, directed to said defendants commanding them to perform that duty.

Writ allowed.

POTTER, J., and BURGESS, District Judge, concur.

BLYDENBURGH, J., being unable to sit, HON. JAMES H. BURGESS, Judge of the Fourth Judicial District, was called in and sat in his stead.

H. E. WRIGHT & CO. v DOUGLAS.

(No. 961; Decided Sept. 29, 1919; 183 Pac. 786.)

PLEADINGS—JUDGMENT ON PLEADINGS FOR WANT OF REPLY—CHATTEL MORTGAGES—FORECLOSURE AFTER TENDER PRECLUDES RECOVERY OF ATTORNEYS' FEES—BILLS AND NOTES—FORECLOSURE BY ADVERTISEMENT ENJOINED—HOLDER OF NOTE PAYABLE AT DENVER OR NEW YORK, AND DEMANDING PAY AT DENVER, NOT ENTITLED TO NEW YORK EXCHANGE—EVIDENCE—PRESUMPTION OF SIMILARITY OF STATUTES OF A SISTER STATE—TENDER—OBJECTION TO CHARACTER OF TENDER.

1. Where in an action to enjoin the foreclosure of a chattel mortgage by notice and sale, the answer alleged that a tender referred to in the petition was insufficient, because attorney's fees were not tendered, and it appeared from the petition that notice of foreclosure was first published three days after tender of payment, a motion for judgment on the pleadings for want of a reply, will be denied.

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2. Where the maker of notes and mortgage tendered payment in gold at maturity, which was refused by the holder who published notice of foreclosure three days thereafter, the holder was not entitled to recover attorney's fees under a provision of the notes providing for an attorney's fee, if placed in the hands of an attorney for collection or collected by an attorney with or without suit.
3. A note payable at the option of the holder at named banks in Denver and New York does not entitle the holder demanding payment in Denver to add to the principal and interest "handling charges to New York" or the cost of New York exchange.
4. As to interest after maturity, the laws of Colorado, where notes were made payable, will be presumed the same as the laws of Wyoming, until the contrary is shown.
5. Where tender of payment of notes is refused for reasons other than that it does not constitute an offer of lawful money, or is not the kind of money or property in which payment is to be made by the terms of the contract, the creditor waives that objection.

ERROR to the District Court, Weston County; HON. ERNEST C. RAYMOND, Judge.

Action by R. S. Douglas against H. E. Wright & Co. to enjoin the foreclosure of a chattel mortgage by notice and sale. From a judgment granting a perpetual injunction, the defendant brings error.

H. S. Ridgely and *C. E. Wampler,* for plaintiff in error. The Court erred in denying defendant's motion for judgment on the pleadings; the statute (4401 C. S.) provides that allegations of new matter in the answer not controverted by a reply shall be taken as true; the answer alleged an insufficiency of tender, and no reply was filed; there was no tender of gold coin, nor was there a tender of attorney's fees stipulated for in the notes; there was error in overruling defendant's objection to the introduction of any testimony in the case; the judgment is not sustained by the evidence, and is contrary to law; the tender was not kept good (38 Cyc. 158); a check is not sufficient tender (Lewis v. Larsen, 45 Wis. 353; Smith v. Merchants' Bank, 14 O. Cir. Ct. 199); it was not shown that Keeler Bros. had

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authority to accept payment for the holder of notes at Denver; the rate of attorney's fees stipulated for was reasonable (Florence Oil Co. v. Gas Co., 55 Colo. 378, 135 Pac. 454); the holder was entitled to payment in gold coin, or the equivalent thereof in Denver, Colorado.

David A. Fakler and *Jesse G. Northcut,* for defendant in error.

The tender was sufficient; no objection was made to the character of the payment tendered, so the point was waived (Boothroyd v. Board, 43 Colo. 435, 97 Pac. 255; Irrigation Co. v. Rogers, 22 Colo. 445, 45 Pac. 423). Of course it must appear that the drawer of the check had funds in the depository bank to meet it (Hunt on Tender, Section 83); the tender stopped interest (Dooley v. Smith, 13 Wis. 608); there was no stipulation for interest at 12% after maturity of the notes; the notes were payable in New York or at Denver at the option of the holder; the holder demanding payment at Denver, and was not entitled to New York exchange; the draft tendered in payment of the notes at maturity was for the full amount of principal and interest due; the lien was discharged by tender, and it was unnecessary to show that the tender was kept good (38 Cyc. 159; McPherson v. James, 69 Ill. App. 377; Daugherty v. Byles, 41 Mich. 61; Stewart v. Brown, 48 Mich. 383); the case is of an equitable nature, and Sec. 4470 C. S. does not apply; there was no justification for placing the notes in the hands of an attorney for collection, and no attorneys' fees should be recovered.

BEARD, CHIEF JUSTICE.

This is an action brought by the defendant in error, Robert S. Douglas, against the plaintiff in error, H. E. Wright & Company, to enjoin the foreclosure by notice and sale of a certain chattel mortgage given by Douglas to one Frank W. Keeler. A temporary injunction was issued, and on final hearing was made perpetual. Wright & Company bring error.

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Douglas alleged in his petition, in substance:

1. That on July 10, 1917, he executed and delivered to Frank W. Keeler, his two promissory notes, one for $5,000.00, and one for $4,259.18, each due six months after date, with interest at 5% per annum from date until paid, and payable at the option of the holder at the Banking House of Keeler Brothers, in Denver, Colorado, or at the National Bank of Commerce, in the City and State of New York.

2. That to secure the payment of said notes he executed and delivered the mortgage in question.

3. That before the maturity of said notes he caused to be tendered the full amount due on said notes, namely, the sum of $9,259.18, as principal, and the further sum of $236.62, in all the sum of $9,495.80, at the Banking House of Keeler Brothers, at Denver, Colorado, the place selected by the holder of said notes, where payment should be made, which said Keeler Brothers refused to accept, to surrender said notes and satisfy and cancel the mortgage securing their payment.

4. That thereafter, and on February 18, 1918, he again caused to be tendered to H. E. Wright & Company, the defendants, the sum of $9,495.80 and the further sum of $120.37, which latter amount defendant claimed as interest since the maturity of the notes, which tender so made defendants refused to accept.

5. That notwithstanding said tender as aforesaid, defendant wrongfully began foreclosure proceedings, and have advertised a "Notice of Chattel Mortgage Foreclosure", giving notice that on March 15, 1918, it would sell at public auction all of the cattle described in said mortgage. (A copy of the notice is set out in the petition, and states:)

"The first publication of this notice shall be on Thursday, to-wit: the 21st day of February, A. D. 1918," and signed,

"H. E. Wright & Company,
"Denver, Colorado.
'Present Holder of Mortgage."

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6. That unless restrained by order of the court, the defendant will proceed to sell the property as advertised.

7. That he stands ready and willing to pay the amount due on said notes on January 10, 1918, and as tendered, and to do all things which he offered to do, and tendered, at any time prior to the bringing of this action.

For answer, defendant pleaded in substance, that the notes by their terms drew 5% interest per annum from date until maturity; and that by the terms of the mortgage the notes should draw interest at 12% per annum after maturity until paid. Denied that plaintiff tendered before the maturity of the notes the full amount due thereon at the Banking House of Keeler Brothers; denied that plaintiff at any other time tendered the full amount due on said notes at any place. Denied that plaintiff tendered or caused to be tendered the full amount due on said notes or that he caused to be tendered at any time the sum of $9,495.80; but state that about the date of maturity of said notes plaintiff tendered in full payment of the principal and interest thereon at the Banking House of Keeler Brothers at Denver, Colorado, a draft drawn by some bank in Nebraska on a bank in Omaha for $9,495.80. That by the terms of said notes they were payable in gold coin. Denied that plaintiff, at any time, tendered or caused to be tendered, the full amount due on said notes, in such gold coin. Answering paragraph 4 of the petition, defendant admitted each and every allegation therein contained; and further alleged that said notes contain an agreement to pay 15% additional as an attorney's fee if placed in the hands of an attorney or collected by an attorney, with or without suit; that prior to the tender mentioned in paragraph 4 of the petition, defendant had placed said notes in the hands of its attorney for collection, that said attorney had undertaken the collection of said notes and had caused the "Notice of Chattel Mortgage Foreclosure", set out in paragraph 5 of the petition, to be published as alleged in said paragraph 5. Answering paragraph 5 of the petition, defendant admitted each and every allegation therein con-

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tained, except it denied that said foreclosure proceedings were wrongfully begun.

Defendant filed a motion for judgment on the pleadings on the ground that new matter constituting a complete defense was pleaded in its answer, to which no reply was filed. The motion was denied, and that ruling is assigned as error. What is claimed to be new matter is stated in the motion as follows:

"That as set forth in paragraph 3 of the answer, the notes secured by the chattel mortgage described in the petition were and are, by their terms, payable in gold coin of the United States of America, and that as set forth in said answer, the plaintiff did not pay, and did not offer to pay in such gold coin at, or prior to the maturity of said notes, the amount due thereon; that as set forth in paragraph 4 of the answer, the plaintiff did not, subsequent to the maturity of said notes, tender the full amount due thereon according to the terms thereof, all as set forth in said answer and the exhibits attached thereto, and made a part thereof."

For the purpose of deciding the correctness of the court's ruling on the motion, it is necessary to consider the answer to the tender of February 18, 1918, which the answer admits was made as alleged. But defendant denied its sufficiency in amount, alleging that an attorney's fee was due in addition to the amount tendered. While it is alleged that prior to the tender the notes had been placed in the hands of an attorney, the only action claimed to have been taken by him was the publication of the notice of foreclosure, which the answer alleges was published as stated in the petition. The notice is set out in the petition and shows on its face that it was not published until three days after the tender, and does not purport to have been the act of an attorney. It is signed, "H. E. Wright & Company", and states, "The First Publication of this notice shall be on Thursday, to-wit: the 21st day of February, A. D. 1918." In that state of the pleadings we think the motion was properly denied.

Whether or not the defendant was entitled to an attorney's fee on the notes is the real question to be determined. The

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facts as shown by the evidence are: That on December 1, 1917, Keeler Brothers wrote plaintiff as follows: "In answer to your letter of November 29, we have been notified by the holder of the papers that he will expect payment of principal and interest on your notes when they mature—January 10, 1918. We do not feel like carrying this paper ourselves, so advise you to make immediate arrangements elsewhere in order that the present holder of your notes will not have them protested at maturity." And on December 10, 1917, they wrote to plaintiff as follows: "With further reference to our letter to you, dated December 1, 1917, we shall expect you to pay promptly on or before January 10, 1918, at our office in Denver, your cattle paper which matures at that date. As these papers have been re-discounted in the East and you undoubtedly want to protect yourself from having them protested for non-payment, it is advisable that you remit as much in advance of the maturity date as possible. You must remit in New York exchange by the terms of your notes. The following are the amounts necessary to make up the amount you must send us in order to take care of your paper:

Principal of your notes	$9,259.18
Interest, 5% (184 days)	236.62
Handling charges to New York (25c per $100)	23.75
Total	$9,519.55"

It will be observed that the notes were not, by their terms. made payable in New York exchange, nor do they provide for exchange or "Handling Charges to New York". They were payable at the Banking House of Keeler Brothers in Denver, in gold coin. Keeler Brothers were not only insisting on prompt payment but requesting payment before due, and demanded in addition to unauthorized "Handling Charges", $5.14 more interest than the notes called for. The interest on $9,259.18 at 5% for six months is $231.48, not $236.62. On January 7, 1918, plaintiff caused to be mailed to Keeler Brothers a draft drawn by the Elgin State Bank

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of Elgin, Nebraska, on the Stock Yards National Bank of Omaha, Nebraska, for $9,495.80, being the amount claimed in Keeler Brothers' letter of December 10, 1917, less said "Handling Charges". January 14, 1918, Keeler Brothers returned said draft to the bank from which it was received and wrote as follows: "We are returning herewith your No. 45186 on the Stock Yards National Bank of Omaha, to our order for $9,495.80, which accompanied your letter of recent date, for the reason that the Robert S. Douglas notes are payable in New York exchange, and in as much as the notes matured January 10th, it will be necessary that your remittance be for an amount sufficient to pay the total principal and interest due on January 10th with 12% therefrom to date of actual payment as provided for in the notes and mortgage. Before making any remittance to take up the notes, it would be well for you to consult with Mr. Douglas, as according to our records there is certain commissions due us, and which we are making a request that Mr. Douglas settle at this time."

The parties stipulated in writing that on February 18, 1918, plaintiff tendered to H. E. Wright & Company $9,616.17, in gold; that said tender was made in payment of the principal of said notes, $9,259.18; interest from July 10, 1917, to January 10, 1918, $236.62; interest from January 10, 1918, to February 18, 1918, $120.37. That said tender was refused by said Wright & Company, and the reason given for such refusal was that it could not accept the money or the tender thereof unless there was added thereto an attorney's fee in the sum of $300.00.

We have thus at length set forth the facts for the purpose of showing the good faith of plaintiff in an honest desire to pay the amount due on the notes, both at maturity and thereafter. Also to show that Keeler Brothers and the defendant were at all times demanding more than the notes and mortgage called for. We have already referred to the item of $5.14; and the 12% interest after maturity is not provided for either in the notes or mortgage. The only place where 12% is mentioned is in the mortgage where it attempts to

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describe the notes secured thereby; but erroneously described them as bearing 5% from date to maturity and 12% thereafter. Nowhere in either of the instruments can be found any agreement to pay 12% after maturity. According to the statutes of this state the notes would draw 8% after maturity; and the laws of Colorado are presumed to be the same until the contrary is shown. There is no evidence that an attorney took any action toward the collection of the notes other than to publish the notice of foreclosure, if, in fact, he did so, three days after the tender in gold of more than the principal and interest then due on the notes. Again referring to the tender of the draft, it is a well settled rule of law that if a tender is refused on grounds and for reasons other than that it does not constitute an offer of lawful money, or is not the kind of money or property in which payment is to be made by the terms of the contract, the creditor waives that objection and cannot thereafter insist that the tender was not good for that reason (Schaeffer v. Coldren, 237 Pa. St. 77, 85 Atl. 98, Ann. Cases 1914B, 175 and notes). In this case Keeler Brothers, in their letter of January 14, 1918, in returning the draft, stated as the reasons for non-acceptance, not that the notes were payable in gold coin, but for the reason stated in their letter of January 14, 1918, above quoted. Had Keeler Brothers, who were handling the matter, stated that the notes were payable in gold, as, in fact, they were, and for that reason they could not accept the draft, plaintiff would then have had opportunity to have tendered the gold as he afterwards did before foreclosure proceedings were commenced by the publication of notice of foreclosure.

In the case of Graves et al. v. Burch, decided by this court June 3, 1919, 181 Pac. 354, the question of the allowance of attorney's fees was fully considered and the authorities cited and reviewed. The principles therein announced and the authorities cited are applicable to the facts in this case, and need not be repeated here. By the judgment the defendant was awarded somewhat more than it was rightfully entitled to; but the plaintiff is not here complaining. The court

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found the facts to be that there was due on the notes and mortgage on February 18, 1918, the sum of $9,616.17, and that on said day plaintiff tendered to H. E. Wright, a member of the firm of H. E. Wright & Company, that amount in gold coin of the United States. By the judgment plaintiff was required to pay that amount to the clerk of the court for the use and benefit of the defendant; enjoined defendant from foreclosing the mortgage; required it to surrender the notes to said clerk for cancellation; that it cancel and satisfy said mortgage of record, and pay the costs of the action. We are satisfied that the judgment is just and equitable, and is, therefore, affirmed. *Affirmed.*

POTTER, J., and BURGESS, District Judge, concur.

BLYDENBURGH, J., being unable to sit, HON. JAMES H. BURGESS, Judge of the Fourth Judicial District, was called in and sat in his stead.

(OCTOBER TERM, 1919)

STATE v. TRUE.

(No. 977; Decided Oct. 6th, 1919; 184 Pac. 229.)

COURTS—ORIGINAL JURISDICTION OF SUPREME COURT TO ISSUE WRITS OF PROHIBITION—STATE ENGINEER NOT AN INFERIOR COURT WITHIN THE MEANING OF THE CONSTITUTIONAL PROVISION RELATING TO WRITS OF PROHIBITION.

1. The original jurisdiction of the Supreme Court is conferred by the constitution, and it has only such power in cases originally brought before it, as is directly conferred by that instrument, or necessary to a full exercise of the powers conferred.
2. The Supreme Court has only such jurisdiction to issue the writ of prohibition and other writs as is directly conferred by the constitution, or necessary to a full exercise of the powers conferred.
3. Under the state constitution, Art. V, Secs. 2 and 3, prescribing the jurisdiction of the Supreme Court, and limiting its

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power to issue writs of prohibition to its appellate or revisory jurisdiction except as enlarged by its "general superintending control over all inferior courts", the Supreme Court has not original jurisdiction to issue a writ of prohibition against the State Engineer to restrain him from holding a threatened hearing on petition to cancel a permit to construct a reservoir, under Comp. St. 1910, Secs. 743-752, the State Engineer not being an "inferior court" within the Constitution.

ORIGINAL PROCEEDINGS in prohibition by the State of Wyoming on the relation of John W. Leazenby against James B. True, State Engineer, to prevent defendant from conducting a hearing upon petition filed with him, to cancel a reservoir permit. Heard upon demurrer to the petition.

W. L. Walls, Attorney General, in support of the demurrer.

This is an original proceeding for the writ of prohibition to prevent action by the State Engineer in conducting a hearing upon an application for the cancellation of a reservoir permit. The State Engineer set the matter for hearing, but prior to the date assigned for hearing, the plaintiff applied to this court for a writ of prohibition to prevent action on the ground that the Engineer is without jurisdiction to conduct such a hearing; the State Board of Control acts in an administrative and quasi-judicial capacity (Inv. Co. v. Carpenter, 9 Wyo. 110); the State Engineer has general supervision of the waters of the state (Const. Art. VIII, Sec. 5); the State Engineer has authority to approve, disapprove or cancel water permits, his action being subject to review by the courts (Sec. 728-737 C. S.); his authority with reference to reservoir permits is defined by Secs. 743-748, and certain other sections mentioned and referred to therein; he has authority to cancel permits (Sec. 748 C. S.); he has authority to make all necessary orders to enforce an observance of the statutes as to applications for reservoir permits, or a compliance with the law thereafter; the courts cannot control the discretion of the State Engineer, as an administrative officer acting within his proper jurisdiction

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(Inv. Co. v. Carpenter, *supra*); the relator has an adequate remedy at law by appeal to the courts (Sec. 733-748). The inconvenience and expense of an appeal will not justify the issuance of a writ of prohibition to prevent official action by the engineer.

W. E. Mullen, in support of the demurrer.

The Constitution, Art. V, Sec. 3, confers original jurisdiction upon this court for the issuance of writs of prohibition in aid of its appellate and revisory jurisdiction; in Dobson v. Westheimer, 5 Wyo. 34, it was held that the supervisory powers of the court over inferior tribunals authorized the issuance of writ of prohibition in any proper case where the remedy had been recognized by common law, if the act sought to be prohibited is of a judicial nature; in State v. District Court, 5 Wyo. 227, it was also held that the writ would lie only when the inferior court or tribunal exceeded its jurisdiction; in State v. Ausherman, 11 Wyo. 420, it was held that the writ might issue in any proper case. The State Engineer has general supervision of the waters of the state (Const., Art. VIII, Sec. 5). His powers comprehend administrative action (Inv. Co. v. Carpenter, 9 Wyo. 110); the Engineer is not an inferior court; he acts in a quasi-judicial capacity only; he may cancel, grant or refuse reservoir permits in proper cases (748 C. S.); he may do this without a hearing, and in doing so acts in his administrative capacity; his discretion may not be controlled by the writ of prohibition; the writ should be denied.

Corthell, McCollough and Corthell, opposing the demurrer.

This court has jurisdiction to restrain by prohibition the action of inferior courts in excess of their jurisdiction (State v. Ausherman, 11 Wyo. 410); the appropriate function of the remedy is to restrain the exercise of unauthorized judicial or quasi-judicial power (High Extraordinary Legal Remedies, 764 A., 32 Cyc. 601, 602, and cases cited; State v. Clendenning, — Ohio St. —, 112 N. E. 1029; State v. Young, 29 Minn. 474, 523; Osage & Okla. Co. v. Millard,

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— Okla. —, 145 Pac. 797, 799; State v. Stevens, — Nev. —, 116 Pac. 605; Baker v. Gooding County, — Ida. —, 138 Pac. 342, 345; State v. Toomey, 27 S. D. 37, 129 N. W. 563; State v. Selectmen of Norwood, 223 Mass. 222, 111 N. E. 851, 852); the controversy before the State Engineer involves a substantial property right; successive appeals do not afford an adequate remedy; the State Engineer acts in a quasi-judicial capacity (Spear v. Stephenson, 102 Pac. 365); the nature of this power is exhaustively discussed in Sugar Co. v. Goodrich, 27 Ida. 26, 147 Pac. 1073; the powers of the Engineer are statutory and do not include the power to cancel water applications; his powers should be strictly construed (Sutherland St. Con. 390); he cannot impose a condition unauthorized by statute (Laughlin v. Board, 21 Wyo. 99; the power of supervision of public waters is administrative (Inv. Co. v. Carpenter, 9 Wyo. 110), and are statutory (Willey v. Decker, 11 Wyo. 496); no power is delegated to determine questions of forfeiture or abandonment (Parshall v. Cowper, 22 Wyo. 385; Prairie Oil Co. v. Cruce, 147 Pac. 152, 36 Cyc. 1179); there can be no forfeiture unless judicially determined (19 Cyc. 1559); the proceedings are adversary and involve a judicial question (State v. Carr, 28 N. E. 88).

BLYDENBURGH, JUSTICE.

This is a proceeding invoking the original jurisdiction of this court to issue a writ of prohibition against the State Engineer to restrain him from holding a threatened hearing seeking to cancel a permit theretofore issued to construct a reservoir to conserve and impound the waters of Harney Creek in Albany County, Wyoming.

The relator alleges in his petition that on August 10, 1914, one D. C. Buntin made and filed in the office of the State Engineer an application for a permit to construct the Harney Creek Reservoir in due form, under the provisions of Chapter 59 (Sections 743-752), Wyoming Compiled Statutes, 1910, and the application is set out in full in the petition. That the State Engineer then in office on the 25th day of

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September, 1914, approved said application and endorsed thereton,

"The State of Wyoming, } ss.
State Engineer's Office. }

"THIS IS TO CERTIFY THAT I have examined the foregoing application and do hereby grant the same subject to the following limitations and conditions:

"Primary Permit. Application for secondary permit describing lands to be irrigated to be filed prior to August 1st, 1915.

"Construction of proposed works shall begin within one year from date of approval.

"The time for completing the work shall terminate on December 31, 1919.

"WITNESS my hand this 25 day of September, A. D. 1914.

"A. J. PARSHALL,
"State Engineer."

And that on July 31st, 1915, the State Engineer made the following endorsement on said application:

"NOTICE of Commencement of Work recorded July 31, 1915. Time for filing secondary application extended to January 31, 1916. (See letter from D. C. Buntin, July 30, 1915.)

"JAMES B. TRUE,
"State Engineer, July 31, 1915."

That said Buntin on the 28th day of February, 1917, sold, assigned and transferred to the relator all his rights under said permit. That W. C. Thomas and John H. Davis, copartners as Davis & Thomas, on April 24, 1918, filed an application in the office of the State Engineer for the cancellation of the relator's permit for the reasons that Buntin had failed to file his secondary application; had failed to begin the construction of the proposed work within one year from the date of approval of the application; that Davis & Thomas hold interest in the waters of Harney Creek which is greatly injured by having the Buntin application stand of record; had expended large sums of money in constructing the Columbus Reservoir; and accompanied

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said application for cancellation by affidavits supporting the statements contained therein, all being set out in full in the petition. That on June 18, 1919, the State Engineer notified relator that a hearing would be had before the State Engineer for the purpose of hearing and determining the allegations contained in the application of Davis & Thomas to cancel his permit; that on June 24, 1919, Davis & Thomas, by their attorney, and the relator, by his attorney, appeared before the State Engineer and thereupon the relator objected and protested against the State Engineer holding said hearing on the ground that the State Engineer was without jurisdiction and authority to hold said hearing and had no power conferred upon him to hear and determine the cancellation of relator's permit, whereupon the State Engineer announced his decision and determination that he had jurisdiction to hear and determine the said matter and to cancel said permit and thereupon adjourned the said hearing until June 28, 1919. That relator's project is not of the character mentioned in sections 746 and 747 of the Wyoming Compiled Statutes, and was not in the opinion of the State Engineer such as to require the appointment of an assistant engineer or the supervision of said work, but was supervised and constructed by the relator himself and was completed by the relator prior to December 31, 1918, without supervision on the part of or under the authority of the State Engineer. Then follows the allegation that the State Engineer has no jurisdiction or authority to hold the hearing or cancel the permit and that he is usurping judicial or quasi-judicial power and that he intends and threatens to proceed further with said hearing and to take evidence concerning the compliance of the relator with the conditions of said permit, and to decide the question of the cancellation of the permit.

It is further alleged that the relator has no adequate remedy other than the writ of prohibition prayed for and that he has expended $3,600; that he needs all the water that can be stored in said reservoir for use in irrigating his lands underlying the same, and if the defendant is permitted to proceed with the hearing and to cancel said permit he will

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be deprived of the use of such waters for an indefinite time during the hearings and determination of the matter before the State Engineer, the Board of Control and the various appeals to the courts, and will be compelled to produce and examine witnesses at great expense without any security or recourse for costs or expenses, and if his permit is cancelled he would be deprived of the right to proceed to apply the waters to beneficial use and to complete his appropriation of the public waters, whereby he would suffer great and irreparable injury. It is then stated that the real parties in interest are Davis & Thomas, the protestants upon whose application the proceedings before the defendant have been taken and conducted. Then follows the prayer for a writ of prohibition to issue to restrain the defendant, his successors in office, and all persons acting under or in aid of them, from further proceedings in the matter of the hearing pending this proceeding, and that upon a hearing in this proceeding such writ be made absolute; that the relator be restored to all his rights, &c. Upon the presentation of the petition an alternative writ of prohibition and an order to the State Engineer to show cause on July 26, 1919, why said writ should not be made absolute, was issued.

The defendant filed a demurrer to the petition, setting up: "First, That it does not appear from the petition of the plaintiff on file herein, that the plaintiff has any right to or cause for the writ of prohibition prayed for in his petition. Second, That the petition of the plaintiff on file herein does not set forth the facts sufficient to entitle the plaintiff to the relief prayed for or to any relief of any kind or character. Third, That the court has no jurisdiction of the subject matter or the subject of the action. Fourth, That the facts stated in the plaintiff's petition are not sufficient to constitute a cause of action."

The case was heard on the demurrer, the attorney for Davis & Thomas joining in the argument in behalf of the demurrer.

It was claimed on behalf of the defendant that he was an administrative officer and that the duties in relation to the

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control and distribution of the waters of the state were of an administrative character; that under the provisions of Chapter 59, Wyoming Compiled Statutes, 1910, he was given the power to cancel any permit for non-compliance with any of the provisions of the chapter, and that the language "and the state engineer is hereby authorized to cancel any permit wherein the provisions of the above sections have not been, or are not being, complied with," contained in section 748, gives such authority, "the above sections" referring to all the preceding sections of the chapter; and the hearing contemplated in this case was merely for the purpose of ascertaining the facts upon which to exercise such administrative functions and therefore could not be reached by a writ of prohibition. That the statute provides for appeal to the Board of Control and from it to the District Court, and thence to this court, and the writ of prohibition cannot be used in place of an appeal proceeding or proceeding in error. "That the State Engineer is not an inferior court nor a tribunal of any kind whose executive acts in the line of his prescribed duties are subject to control by the writ of prohibition."

On the other hand, it is contended on behalf of the relator that the writ of prohibition is not only to restrain inferior courts or judicial tribunals, but also to restrain the exercise of judicial or quasi-judicial functions or power by administrative tribunals or administrative officers who attempt to usurp such powers without lawful authority. That the hearing proposed and the cancellation of the permit is a judicial proceeding and determination of property rights between adversaries, and of a judicial character. That no power is attempted to be given to the State Engineer to cancel such a permit as that of the relator. That section 748 and the language employed therein "above sections" refers to sections 746 and 747 solely as the sections mentioned in section 748, and to no other sections of the chapter. That if the law attempted to give to the State Engineer judicial power it would be unconstitutional. That the State Engineer had no power to impose the condition as to time for filing a

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secondary permit, and it is therefore void. That this is a proper case for a writ of prohibition and no other adequate remedy exists.

We are, at the outset, confronted with a question of jurisdiction: Whether this court has original jurisdiction to issue a writ of prohibition in a case of this kind against the State Engineer. In the earlier cases in this court, where the original jurisdiction of this court was invoked to issue writs of prohibition it was contended that this court had power to issue the writ only in cases coming here on proceedings in the nature of appeal or proceedings in error (Dobson v. Westheimer et al., 5 Wyo. 34, 36 Pac. 626; State ex rel. Mau v. Ausherman, 11 Wyo. 410, 72 Pac. 200, 73 Pac. 548). But in those cases it was held that the original power to issue the writ was not confined to cases which first reached this court by appellant proceeding, but it was held that by the provision of the constitution giving "general superintending control over all inferior courts" this court was vested with original jurisdiction in proper cases to issue writs of prohibition to restrain the action of *inferior courts* in excess of their jurisdiction. The original jurisdiction of this court is conferred by the constitution and it has only such power in cases originally brought here as is directly conferred by that instrument or that are necessary to a full exercise of the powers conferred (15 C. J. 730, 731, 1025; 7 R. C. L. 1030, 1072, 1076, 1077; 32 Cyc. 623). And this applies to the writ of prohibition and other writs (22 R. C. L. 26). The sections of the constitution applicable are sections 2 and 3 of Article V, which are as follows:

"Sec. 2. The supreme court shall have general appellate jurisdiction, co-extensive with the state, in both civil and criminal causes, and shall have a general superintending control over all inferior courts, under such rules and regulations as may be prescribed by law."

"Sec. 3. The supreme court shall have original jurisdiction in quo warranto and mandamus as to all state officers, and in habeas corpus. The supreme court shall also have power to issue writs of mandamus, review, prohibition,

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habeas corpus, certiorari, and other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction. Each of the judges shall have power to issue writs of habeas corpus to any part of the state upon petition by or on behalf of a person held in actual custody, and may make such writs returnable before himself or before the supreme court, or before any district court of the state or any judge thereof."

In the constitutions of a number of the states original jurisdiction is given the supreme court to issue writs generally without limitation and in such cases it is generally held that the writ of prohibition may issue to any inferior tribunal having judicial or quasi-judicial powers, whether called a court or not, and even in extreme cases to strictly administrative boards or officers who attempt to usurp judicial functions (22 R. C. L. 14, 15, 17; 32 Cyc. 601). But it was originally only directed to a court. It is defined by Blackstone as a writ "directed to the judge and parties of a suit in any inferior court, commanding them to cease from the prosecution thereof upon suggestion that either the cause originally or some collateral matter arising therein does not belong to that jurisdiction but to the cognizance of some other court" (3 Black Com. 112). But it will be noticed that the original power granted this court by the Wyoming Constitution is much more restricted than in the states referred to. The power to issue these prerogative writs is confined to its appellate and revisory jurisdiction, except as enlarged by its "general superintending control over all inferior *courts*". And as to state officers the original jurisdiction is limited to quo warranto and mandamus.

In Dobson v. Westheimer, *supra,* this court intimated at least that its original jurisdiction to issue the writ of prohibition was confined to inferior courts. Chief Justice Groesbeck, in the opinion in that case, said: "So it appears that either under the common law or by virtue of a statute the writ will not lie except to prevent the encroachment of jurisdiction by *courts,* or, at the farthest, bodies exercising quasi judicial functions." And State ex rel. Mau v. Ausherman

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goes no further than to hold that under the power of "superintending control" this court has original jurisdiction to issue the writ of prohibition to inferior courts, Judge Potter in the opinion in that case, after discussing this provision of the Constitution, saying: "We are of the opinion, therefore, that this court is vested with jurisdiction in proper cases calling for its exercise to issue writs of prohibition to restrain the action of *inferior courts* in excess of their jurisdiction."

It then remains to consider whether the writ of prohibition asked for here is directed to one of the *inferior courts* of the state.

The State Engineer is a constitutional state officer endowed with certain administrative duties relating to the public waters of the state, but is nowhere therein mentioned as a court or given judicial functions and it would seem that a constitutional provision using the words "inferior courts" was intended to mean those *courts* mentioned or provided for in the constitution. But we are not without authority for the proper construction of this constitutional language. The constitution of South Carolina in this respect is as follows, Section 4 of Art. IV:

"The Supreme Court shall have appellate jurisdiction only in cases of chancery, and shall constitute a court for the correction of errors at law, under such regulations as the General Assembly may by law prescribe; provided, the said court shall always have power to issue writs of injunction, mandamus, quo warranto, habeas corpus, and such other original and remedial writs as may be necessary to give it a general supervisory control over all other courts in this state." This provision is substantially like the one in the Wyoming Constitution. In the case of State ex rel. Richland County v. Columbia, 16 S. C. 412, the Supreme Court of South Carolina said:

"It will thus be seen that this court has power to issue certain *specified* writs in *any* case where such a remedy may be appropriate (Wallace v. Hayne and Mackey, 8 S. C. 374), and that it also has power to issue such other original

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and remedial writs as may be necessary to give it a general supervisory control over all other *courts* in the state. Accordingly, it has been held that when this court is asked to issue a writ which is not among those *specifically* named in the above cited section of the constitution, it must be made to appear that the writ is asked for to enable this court to exercise some supervisory control over some one of the *courts* of this State, as this court has no power to issue such a writ except to some one of the *courts* of this State for the purpose above indicated. * * * 'This unrestrained right, as to the writs specified, does not attach to "other original writs", in which that now sought is included. The very qualification which is annexed shows that the power is restricted, and that a more limited jurisdiction was intended.' * * * Whenever this court is asked to issue one of the writs not specifically mentioned in the above-cited section of the constitution, it is necessary to make it appear: 1. That the writ is to go to one of the *courts* of this State. 2. That such writ is demanded for the purpose of enabling this court to exercise some supervisory control over the *court* to which the writ is to be directed. * * * Hence, the first inquiry is whether the writ asked for is to go to one of the *courts* of this State; and, 2d, whether such writ is demanded for the purpose of enabling this court to exercise some supervisory control over the *court* to which it is to be directed. The body to which the writ is to be directed is the body in which the municipal authority of the city of Columbia is vested, called in the act incorporating said city, The mayor and aldermen of the City of Columbia, and the questions are: Whether that body is such a court as is contemplated by the constitution, and, if so, whether the writ is demanded for the purpose of enabling this court to exercise some supervisory control over such body acting in its judicial capacity?"

And upon rehearing of the jurisdictional question in 17 S. C. 80, where it was argued that "because the act sought to be restrained is an act of a judicial nature it must necessarily be regarded as the act of *a court,* and therefore this

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court would have original jurisdiction to issue the writ", that court said:

"It does not follow, however, that a judicial act can only be performed by a court. There is no reason why the legislature may not entrust the performance of acts of a judicial nature to persons and bodies corporate who do not constitute one of the courts of the state; and it is the constant habit to do so. The legislature has at various times conferred upon clerks, sheriffs, and many other officers the power to perform judicial acts, in the sense that they involve the exercise of judgment and discretion; and we do not understand that it was ever supposed that such officers were thereby constituted courts. * * * There is necessarily involved in the idea of a court that of a tribunal empowered to hear and determine issues between parties, upon pleadings, either oral or written, and upon evidence to be adduced under well-defined and established rules, according to settled principles of law."

And in Hunter v. Moore, 39 S. C. 394, 17 S. E. 797, approving the decision in State v. Columbia, *supra,* the court said: "It was there conclusively determined that the Supreme Court, in the exercise of its original jurisdiction. has no authority to issue a writ of prohibition, unless it is directed to one of the courts of the State, for the purpose of enabling the Supreme Court to exercise a supervisory control over the court to which it is directed. * * * So that the only remaining question in this case is, whether the writ of prohibition asked for here is to be directed to one of the courts of the State for the purpose of keeping it within the limits of its jurisdiction. It seems to us too clear for argument that the town council of Yorkville is not one of the courts of the State referred to in section 4 of Article IV of the Constitution, though invested, it may be, with certain judicial powers for certain prescribed purposes."

So here it seems to us too clear for argument that the State Engineer is not one of the inferior courts of this State referred to in section 2 of Article V of the Constitution.

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As to whether a court of general original jurisdiction, like our district courts, would have authority to issue a writ of prohibition against an administrative officer such as the State Engineer, when it is alleged that he has usurped judicial powers without authority of law, there seems to be some conflict of authority, and it is not necessary to decide in this case, and we do not decide. The questions raised by the parties in this case as stated herein are interesting and important, but as we hold that this court has no original jurisdiction to issue the writ of prohibition in a case of this character it becomes not only unnecessary but improper for us to consider or determine these questions in this case.

We hold that this court, under the Constitution, has no original jurisdiction to issue a writ of prohibition to the State Engineer, and therefore the demurrer will be sustained, the writ will be denied, the order to show cause quashed and the petition dismissed.

Writ denied and petition dismissed.

BEARD, C. J., and POTTER, J., concur.

NORTH LARAMIE LAND CO. v. HOFFMAN.

(No. 967; Decided Oct. 6, 1919; 184 Pac. 226.)

ATTORNEY AND CLIENT—NONRESIDENT ATTORNEYS ARE UNAUTHORIZED TO SIGN PETITIONS IN ERROR—APPEAL AND ERROR MOTION TO DISMISS COURTS—JURISDICTION OF SUBJECT MATTER NOT ACQUIRED BY AGREEMENT—PETITION AND ERROR WILL BE DISMISSED WHEN VOID.

1. Nonresident attorneys may, under Comp. Stat. 1910, Sec. 966, be admitted *ex gratia* for purposes of a pending case in which they have been employed, but not as members of the Bar of the State, and the section does not authorize a nonresident attorney to sign a petition in error.
2. A motion for extension of time to file briefs, made subject to a ruling on a motion to dismiss, filed the same day, did not waive the right to move for a dismissal.
3. Jurisdiction of the subject matter of an action cannot be conferred by agreement.

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4. A petition in error signed by nonresident attorneys only, is a nullity, and will be dismissed upon motion.

ERROR to the District Court, Platte County; HON. WILLIAM C. MENTZER, Judge.

Heard on motion to dismiss. No briefs.

Pam & Hurd and *William A. Riner,* for plaintiff in error.

Kinkead & Henderson, for defendants in error.

BEARD, CHIEF JUSTICE.

In this case a motion by the defendants in error to dismiss the proceedings in error has been filed and submitted. The ground for the motion is stated in a number of separate paragraphs, but all go to the single question of the sufficiency of the petition in error to constitute the commencement of proceedings in error, or to give the court jurisdiction of the subject matter of the action. It appears from the petition on file, and it is admitted, that said petition is subscribed "Pam & Hurd, Attorneys for plaintiff in error," and by no other person or party. It is also admitted that said Pam & Hurd are not members of the bar of this state, or licensed to practice in this court, but are members of the bar of the State of Illinois, and reside in the City of Chicago, in said state; that no permission has been requested by them, or either of them, to appear as attorneys in this court, nor has such permission been granted to them or either of them, at any time, nor have they, or either of them, been admitted by this court as attorneys for the purposes of this case. The statutes of this state regulating proceedings in error, provide: Section 5111, Comp. Stat. 1910, "The proceedings to obtain such reversal, vacation, or modification, shall be by petition in error, filed in the court having power to make the reversal, vacation or modification, and setting forth the errors complained of"; etc. The statutes governing pleadings in courts of record provide: "The pleadings are the written statements by the parties of the facts constituting their respective claims and defences" (Section 4377, id.). "Every pleading and motion must be subscribed by the party or his attorney." * * *

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(Section 4422, id.). The statutes prescribing the qualification of applicants for admission to practice as attorneys at law, provide: "No one shall be admitted who shall not be a citizen of the United States, a bona fide resident of this state, at least twenty-one years of age, and a person of good moral character" (Section 959, id.). And by section 966, id., it is provided: "Members of the bar of any other state, district or territory of the United States, who may be employed as counsel in any case pending before any of the courts of this state, may be admitted for all the purposes of the case in which they are so employed, by the court before which said case is pending, without examination."

The attorney of the party to an action who is authorized to subscribe pleadings is an attorney who has the right to practice in the court wherein the case is pending; and it has been uniformly held, so far as we have been able to find, that a non-resident attorney has no such right except as provided by statute or rule of court. In Richardson agt. Brooklyn City and Newton R. R. Co., 22 How. Pr. 368, it was held that "An attorney at law, who is a non-resident of this state, has no authority or right to, and cannot, practice in the courts of this state." (We quote from the syllabus.) And in Newburger et al. agt. Campbell, 58 How. Pr. 313, it was held that where a judge knowingly permitted to practice in his court one not regularly admitted to practice, his judgment, rendered in a cause so conducted in violation of law, is void and will be reversed. See also Kaplan v. Berman, 37 Misc. 502, 75 N. Y. Supp. 1002. In Ellis v. Bingham County, 7 Idaho 86, 60 Pac. 79, it is said: "A brief has been filed on behalf of the respondent, signed by persons who are not members of the bar of this court. We cannot receive or recognize such briefs, and said brief is ordered stricken from the files. The action of the parties who filed such brief in violation of the statutes and rules of this court, and such practice cannot be tolerated." In Anderson v. Coolin, 27 Idaho, 334, 149 Pac. 286, a motion to strike from all the papers and files originally filed in the supreme court, the name of a non-resident attorney who had signed the same,

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but who had not been admitted to practice or appear in the case, was sustained. The court said: "We do not wish to be understood as holding that the district courts, as well as this court, have not the inherent power, as a matter of comity, to permit an attorney from a sister state or territory to present argument in any pending case, but even this prerogative should not be abused, and where attorneys from sister states or territories have business which requires their intermittent appearance in the courts of this state, it is quite proper that they should comply with the provisions of the laws of this state regulating the right to engage in the practice of their profession within this jurisdiction." It is to be observed that the statutes of Idaho upon which that case was decided required all pleadings filed in the district courts or the supreme court to be signed by a resident attorney of Idaho. But as we hold that the attorney of the party who is authorized by the statutes of this state to subscribe pleadings is an attorney who, at the time the pleading is filed, is authorized to practice in the court wherein the pleading is filed (of which we will speak later) the decision last above cited is applicable to the case at bar.

A statute of Wisconsin provided that attorneys of other states which granted to Wisconsin attorneys like privileges should be admitted to practice in the courts of Wisconsin. The Supreme Court of that state held in The Matter of the Motion to Admit Ole Mosness, Esq., a non-resident attorney, to the Bar of that Court, 39 Wis. 509, that he could not be admitted and licensed as a member of the bar of that state; but that the practice of the courts of record in the several states to admit members of the bar in other states to appear as counsel on the trial or argument of causes *ex gratia*, for the occasion, was what was intended by the statute, saying: "It would be an anomaly, dangerous to the safe administration of justice, that the office should be filled by persons residing beyond the jurisdiction of the court, and practically not subject to its authority. We take it, that members of the bar of this state lose their right to practice here by removing from the state. After they become non-residents,

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they can appear in courts of this state *ex gratia* only. Our courts cannot have a non-resident bar." The court further said, "that it is difficult to believe that Ch. 50 of 1855 was intended to do more than to authorize the appearance here, as counsel in the trial and argument of causes, of gentlemen of the bar of other states. If intended to do that, it was probably unnecessary. If intended to do more, it was clearly without the power of the legislature." For the reason that the gentleman whose admission was moved was not a resident of the state, the motion was denied. To the same effect see In re. Admission to the Bar, 61 Neb. 58, 84 N. W. 611, and In re. Robinson, 82 Neb. 172, 117 N. W. 352, 17 Ann. Cas. 878. The statutes of this state are in harmony with those decisions, and permit and provide for the admission of non-resident attorneys, not as members of the bar of this state, but *ex gratia,* for the occasion.

In Youmans v. Hanna, 35 N. D. 479, 160 N. W. 705, 161 N. W. 797, Ann. Cas. 1917E, 263, it is stated that non-resident attorneys were not entitled to practice in the courts of that state at all, except by courtesy and permission. A brief presented by a member of the bar of New Jersey who has not been licensed to practice as a counselor-at-law will not be received. (Duysters v. Crawford, 69 N. J. Law 229, 54 Atl. 823.) See also Fallon v. State, 8 Ga. App. 476, 69 S. E. 592. And Robb v. Smith, 3 Scamon (Ill.) 46. In the present case, Pam & Hurd being non-resident attorneys and not even having requested or been granted permission to appear in this court, and not having been admitted in this court for any purpose in the cause, no act of theirs as such attorneys can or will be recognized by the court. The petition in error not being subscribed by any one authorized to do so is not such a petition as will invoke the jurisdiction of the court, is a nullity, and should be stricken from the files. Indeed the statute does not empower the court to admit non-resident attorneys for the purpose of bringing an action, but only to admit them in a *pending* action. And as proceedings in error are required to be commenced by the filing of a petition in error, it is clear that the proceedings are not *pending* until

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such petition is filed, so as to permit the admission of a non-resident attorney for the purposes of the case (and that is the full extent to which he can be admitted). In other words, no permission can be given by the court to a non-resident attorney to institute the proceeding.

It is argued that inasmuch as counsel for defendants in error filed a motion for an extension of time within which to file and serve a brief in the case that they waived their right to move for a dismissal of the proceedings in error. The motion for an extension of time to file brief was filed the same day as the motion to dismiss, and was made expressly subject to the ruling on the latter motion. Even if that had not been done it is well settled that jurisdiction of the subject matter of an action cannot be conferred by agreement, or waiver. There being no sufficient petition in error filed in the case, there is nothing requiring or authorizing the court to consider or determine the alleged errors of the trial court. The motion of defendants in error to dismiss the proceedings in error will have to be granted and the proceedings in error dismissed; and it is so ordered. *Dismissed.*

POTTER, J., and BLYDENBURGH, J., concur.

BACHMAN v. HURTT.

(No. 912; Decided Oct. 27, 1919; 184 Pac. 709.)

HOMESTEAD—EXEMPTION OF SEPARATE PROPERTY OF WIFE—EVIDENCE—PAROL EVIDENCE OF PURPOSE OF MORTGAGE ADMISSIBLE—MORTGAGES—RENEWAL OF MORTGAGE AS EXTINGUISHMENT OF LIEN.

1. A married woman, against whom a personal judgment is rendered, even though such judgment is also against her husband, is, under Comp. Stat. 1910—4615—entitled to a homestead exemption in her separate property on which she lived with her husband, though she is not the head of a family and as such entitled to the exemption provided by Sec. 4755.
2. Parol evidence is admissible to show the purpose for which a mortgage is given where it does not tend to contradict

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the written evidence, and the notes and mortgages, but was for the purpose of proving an extraneous fact or surrounding circumstance, to-wit: The purpose and intention of the parties in making the transaction evidenced by the writing.

3. Where there was a substitution of one mortgage for another upon the same property, without the payment of money, for the convenience of parties, the acts being practically simultaneous, and parts of the same transaction, with the intent that the debt and security shall continue, the result is a renewal of and not an extinguishment of the mortgage lien, and it does not give priority to an intervening judgment, even though there was a change in the mortgage debtor.

APPEAL from District Court, Sheridan County, HON. E. C. RAYMOND, Judge.

Action by Theodore Bachmann against Nora L. Hurtt and others. From an adverse judgment, Wyoming Loan and Trust Co. appeals.

Clark and Wolcott, for Appellant.

The former owner of the land, Ida M. Powers, not being the head of a family, was not entitled to a homestead exemption (Const. Art XIX, Jones v. Losekamp, 19 Wyo. 83); the judgment of the Trust Co. became a lien upon the cancellation of the old mortgage, which lien was superior to the new mortgage, taken by the plaintiff Bachmann. Under statutes similar to ours it is held that only the head of a family is entitled to the exemption (McGinnis v. Wood, 47 Pac. 492; Towne v. Rumsey, 5 Wyo. 11; Barry v. Assurance Co., 49 Pac. 148; Ness v. Jones, 88 N. W. 706); there being no homestead exemption, the judgment of the Trust Co. became a lien upon the release of the old mortgage; where a senior lien holder impairs the security of a junior lien holder by releasing the principal debtor from personal liability, he subordinates his lien to that of the second lien holder (Sexton v. Pickett, 24 Wis. 346; Barnes v. Mott, 64 N. Y. 397; McKeen v. Haseltine, 49 N. W. 195; Edwards v. Thom, 5 So. 707; Mather v. Jenswold, 32 N. W. 512;

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Marple v. Marple, 65 Pac. 645; Conner v. Welsh, 8 N. W. 260).

Metz and Sackett for respondents, Nora L. and John M. Hurtt; *H. Glenn Kinsley,* for respondent, Theodore Bachmann.

Homestead exemptions are provided by the Constitution and Statutes of Wyoming (Art. XIX; 4755-4760 C. S.); the statute recognizes a homestead exemption in the separate property of the wife; a wife who is the owner of a homestead is considered the head of the family (McFee v. O'Rourke, 15 Pac. 420); the purpose of the statute is to protect the family (Orr v. Schraft, 22 Mich. 260; Edmondson v. Meecham, 50 Miss. 390; no designation other than occupancy is required by the Wyoming statute; the exemption is good as against mechanics' or laborers' liens for improvements (Lumber Co. v. Vance, 88 Pac. 896); the exemption applies to separate property of the wife, even though the husband is living thereon (Herring v. Johnson, 72 S. W. 793; Hardin v. Wolve, 29 La. Ann. 333). The case of McGinnus v. Wood, cited by the counsel, involved a purchase money mortgage, and is not in point; the requirements of occupancy precludes any danger of allowing two homestead exemptions; the discharge of the old mortgage did not give an intervening judgment priority, since the new mortgage was a mere renewal of the old one; moreover, the new mortgage was a purchase money mortgage: the mortgagors having assumed the payment of the old mortgage upon purchasing the land (Curtis v. Root, 20 Ill. 53; Jones on Mortgages, 399, 924, 927; Swift v. Kraemer, 13 Cal. 526; Childs v. Stoddard, 130 Mass. 110); a change in the form of the security, or the substitution of a new mortgage for the one given at the time of the purchase does not affect the operation of a renewal (Powers v. Pence, 20 Wyo. 339: Bankers Co. v. Hornish, 27 S. E. 459).

Clark and Wolcott, in reply.

The constitution does not contemplate two homestead exemptions; the right is limited to the heads of families;

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Sec. 5610 C. S., adopted from California, has no application, since it relates to the selection of homesteads, for which we have no law. McFee v. O'Rourke and Lumber Co. v. Vance, cited by respondents, are not in point, owing to different constitutional provisions; there can be but one head of a family, and the phrase is synonymous with the owner of the home; the old mortgage was discharged and satisfied, and appellants' judgment took priority over the new mortgage; there are different mortgagors, so that the new mortgage cannot logically be considered a renewal of the old one.

WINTER, DISTRICT JUDGE.

This is an action to foreclose a mortgage dated August 5th, 1914. It secured a promissory note of the same date for $1,600.00, bearing interest at 10 per cent. These instruments were signed by the defendants, Nora L. Hurtt and John M. Hurtt. On February 24, 1914, the defendant Wyoming Loan and Trust Company, duly obtained and docketed a judgment in the District Court of Sheridan County for $1,620.30 and costs, against Ida M. Powers and her husband, E. E. Powers, at which time the said Ida M. Powers was the record owner of the real estate in question.

On August 6, 1914, Ida M. Powers and her husband sold the premises, subject to a mortgage of $1,600.00, to the defendant, Nora L. Hurtt, and on November 4, 1914, the sale was consummated and possession transferred.

In June, 1910, one Spracklen and wife, then the owners of the premises, gave a mortgage for $1,600.00 to one Mary M. Kueny. Thereafter, and prior to the judgment of the defendant, Wyoming Loan and Trust Company, the Kueny mortgage was assigned to plaintiff.

The defendants, Nora L. Hurtt and John M. Hurtt, filed an answer and cross-petition in which they admitted the judgment of the Trust Company, but alleged that the said Ida M. Powers and E. E. Powers were, at the time said judgment was rendered, occupying said premises as a homestead, and that the mortgage in suit was given to take the place of the Kueny mortgage above mentioned, which had

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never been paid and that at the time the property was purchased by them from Powers its value did not exceed $2,400.00.

The case was then tried upon the theory that the former owner, Ida M. Powers, had a homestead interest in the real estate in question, which was exempt from levy and sale on execution under the Trust Company's judgment: that the homestead interest amounted to $1,500.00 (the then statutory limit of exemption); that the mortgage given in 1910 by Spracklen for $1,600.00 to Kueny and assigned to Bachmann, the plaintiff, in 1911, was never paid; that there was a substitution in its place of the new note and mortgage and its purpose was to continue the security of the old mortgage; and that the said homestead exemption and the new note and mortgage herein sued upon were superior to the judgment of the Trust Company. Further, that the lien, if any, of the Trust Company's judgment could be satisfied, if at all, only out of any equity there might be in this property, over and above $3,100.00; that the property never at any time had a value equal to $3,100.00, and that therefore the property passed from Powers to Hurtt free and clear of any lien of the Trust Company.

Upon the trial of the case, the District Court, upon the law and the evidence, sustained this theory, made findings of fact and conclusions of law in conformity therewith, and rendered judgment for the plaintiff, denying the lien of the Trust Company. The defendant, Wyoming Loan and Trust Company, appeals.

The first question in this case is: Was the former owner of the land, Ida M. Powers, entitled to a homestead interest or exemption in the premises?

The provision of our constitution was, and is, as follows:

Article 19 of the Constitution: "Homesteads, Section 1, Exemption Of. A homestead as provided by law shall be exempt from forced sale under any process of law and shall not be alienated without the joint consent of husband and wife, when that relation exists; but no property shall be exempt from sale for taxes or for the payment of obliga-

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tions contracted for the purchase of said premises, or for the erection of improvements thereon."

The statutory provisions regarding homesteads are Sections 4615, 4755, 4756, 4757, 4760, 5610. Sec. 4755, Compiled Statutes 1910, in force at the time of the transactions herein involved, is as follows:

"Every householder in the State of Wyoming, being the head of a family, and every resident of the State who has reached the age of sixty years, whether the head of a family or otherwise, shall be entitled to a homestead not exceeding in value the sum of Fifteen Hundred Dollars, exempt from execution and attachment arising from any debt, contract or civil obligation entered into or incurred."

The authorities and arguments of counsel for the parties hereto centered upon the above section as the positive act creating "a homestead as provided by law".

The contentions of counsel were upon the meaning, scope and limitations of the words "being the head of a family". Had this been the only section contained in our statutes bearing directly upon the question, it might be contended with considerable support from the authorities submitted and examined, that Ida M. Powers (the property being in her name), living upon the premises, with her husband and family, the husband supporting and maintaining them, could not be considered as "the head of a family" within the meaning of the above Section 4755. But we need not review the cases and the arguments upon this question or determine what the law would be were it to rest on Section 4755 alone, as the positive statute on the subject, as the matter is placed beyond controversy by Section 4615, Compiled Statutes 1910, which is as follows:

"When a married woman sues or is sued alone, like proceedings shall be had, and judgment may be rendered and enforced as if she were unmarried, and her separate property and estate shall be liable for the judgment against her; *but she shall be entitled to the benefit of all exemptions to heads of families.*"

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The Ohio Code, section 5319, Revised Statutes of 1880, was identical with our section 4615. That section in the Ohio Code was amended in 1884, but without any change except the omission of the word "alone" following the words "when a married woman sues or is sued", which change was made because of the amendment of another section of the code in the same amendatory act which provided that a married woman shall sue and be sued as if she were unmarried, and that her husband shall be joined with her only when the cause of action is in favor of or against both her and her husband. We do not regard that difference in the present Ohio statute as material so as to create any distinction in construing the last clause of the section entitling the married woman against whom a personal judgment is rendered to the benefit of all exemptions to heads of families. Nor was it regarded as material in that respect by the courts in Ohio. Before as well as after the amendment the statute was construed as giving a married woman the exemptions aforesaid under a judgment rendered against her. Under the statute as it read in 1880, identical with our statute, it was held in Patrick v. Littell, 36 O. St. 79, decided at the January Term, 1880, wherein a married woman was sued jointly with her husband upon a contract for the payment of money, that the statute gave her such exemptions as are provided for heads of families, since, quoting from the opinion in that case, "she might have been sued alone." The court said:

"It is a contract or obligation upon which, under section 28 of the Code, as amended March 30, 1874, she might have been sued alone; and being of that character, the statute requires the like judgment to be rendered and enforced, in all respects, as if she were unmarried (71 Ohio Laws, 47). It was one of the objects of this section, as thus amended, to so far modify the disabilities of coverture, as to authorize a personal judgment to be rendered against a married woman, where such judgment would have been proper, had she remained unmarried. * * * Prior to the date at which a personal judgment was authorized, the decree, according to the English practice, and that of some of the

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states, was directed against the estate, declaring the separate estate vested in the wife at the date of the decree which it was within her power to dispose of, chargeable with the payment of the debt. * * * But under the statute as amended, the same judgment is required, with the same process for its enforcement as would be awarded if the wife were sole; and, saving to her such exemptions as are provided for heads of families, her separate estate is made liable for any judgment rendered against her, to the same extent as would be the property or estate of her husband, for any judgment rendered against him."

In Hill v. Myers, 46 O. St. 83, 19 N. E. 593, decided at the January Term, 1887, Dickman, J., referring to said section 5319, Ohio Revised Statutes, says:

"But in proceeding by way of execution against the wife's separate property, the law has in a liberal and humane spirit, guarded all her rights of homestead. It is provided by Section 5319, *supra,* that she shall be entitled to the benefit of all exemptions to heads of families" * * * "With the changed remedy against a married woman, allowing a personal judgment followed by execution, goes *pari passu* the statutory protection of her homestead."

This position is further supported by Kimmel et al. v. Paronto, 52 O. St. 469, 43 N. E. 1040, and Shaw v. Foley, 62 O. St. 30, 56 N. E. 475. These cases, construing the Ohio provision, are conclusive, and on Section 4615, together with Sections 4755 and the other sections mentioned which harmonize with this view, we hold that Ida M. Powers had a homestead interest in the premises which was exempt, that the judgment of the appellant, Wyoming Loan and Trust Company, did not attach and said company was not entitled to a judgment for a lien on the premises.

The second question to be determined is whether the discharge of the Spracklen-Kueny mortgage automatically made the judgment of the Trust Company a prior lien. The answer depends upon the facts as to whether the Hurtt-Bachmann mortgage was given for the purpose and with the intention of continuing the security of the old mortgage. It

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is urged by appellant that the trial court erred in admitting oral evidence to show this fact.

We think the evidence was admissible, as it did not tend to contradict the written evidence and the notes and mortgages, but was for the purpose of proving an extraneous fact or surrounding circumstances, to-wit: the purpose and intention of the parties in making the transaction evidenced by the writing. It is possibly in the nature of a separate, oral agreement on a subject not included in or disclosed by the writings, and not inconsistent with their terms (Ency. of Ev., Vol. IX, page 350, and cases cited). The evidence so admitted proved beyond question that such was the intention of all the parties thereto. This was not contradicted by the writings or any oral evidence. The evidence sustains the findings of fact of the trial court upon this point.

There was a substitution of one mortgage for another, without the payment of money, for the convenience of the parties, the act being practically simultaneous and parts of the same transaction, with the intention that the debt and security should continue.

"Entering satisfaction of a mortgage and taking a new one, when designed by the parties to be merely a continuation of the first mortgage, and when the two acts are practically simultaneous or parts of the same transaction, is not an extinguishment of the mortgage, but a renewal thereof, and does not give priority to an intervening judgment or mortgage creditor of the mortgagor, especially where it is done in good faith, in ignorance of the existence of the intervening lien, and without any intention to release the lien of the mortgage" (27 Cyc. 1222, and cases cited. Packard v. Kingman, 11 Ia. 219; Ponder et al. v. Ritsinger et al., 1 N. E. 44; Jones on Mortgages, Par. 924, 927; Story Eq. Par. 1035 c, 1035e; Swift v. Kraemer, 13 Cal. 526; Childs v. Stoddard, 130 Mass. 110).

"The taking of a new note in place of the one originally given does not operate as an extinguishment of the mortgage lien, unless that is shown to be the actual and express intent

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of the parties" (First National Bank v. Citizens' State Bank, 11 Wyo. 62).

"A change in the form of the security and the substitution of a new mortgage for the one given at the time of the purchase does not affect the operation of the rule, and the principle is not rendered inapplicable by the fact that the new or substituted mortgage is executed to a third party for money advanced or loaned for the purpose."

"And so where the money is borrowed for the purpose of paying the original purchase money mortgage upon the giving of a new mortgage to the lender to secure the amount, since the lender might have first taken an assignment of the first mortgage, and released it upon receiving a new mortgage in its place, the transaction may be regarded in equity as if that had been done, where the intention appears to have been to substitute the new for the old mortgage, giving the new mortgagee the same lien" (Powers v. Pence, 20 Wyo. 339, and cases cited; 20 Ency. L. (2nd Ed.) 1063).

The appellant insists that the above authorities are inapplicable because in this case there was a change of debtor and not merely a renewal between the same parties. The rule is clearly applicable where there is a change of creditor. We see no reason why the same rule should not apply where there is a change of debtor. There was no extinguishment of the debt. The intention of the parties as disclosed by the evidence was that the debt and the security should continue.

"The thing secured is the debt, rather than the note and other evidence thereof, and so long as the debt can be traced, whatever form it may assume, the security remains good as security for the debt" (First National Bank v. Citizens' State Bank, 11 Wyo. 62; 20 Ency. L. (2nd Ed.) 959; 2 Jones on Mort. 924; Simmons Hardware Co. v. Thomas, 147 Ind. 313; Bray v. First Avenue Coal Mining Co., 148 Ind. 599; McCoughrin v. Williams, 15 S. C. 505).

In each of the cases cited by appellants the money was paid and the debt extinguished. Such were not the facts in the case at bar.

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We conclude, therefore, under the evidence in this case, and the law applicable thereto, that the judgment of the Trust Company did not become a prior lien to the mortgage, and that, there being a homestead interest exempt, said judgment did not attach to or become a lien on the premises. The judgment of the District Court is affirmed. *Affirmed.*

POTTER, J., and MENTZER, District Judge, concur.

HON. CHARLES E. WINTER and HON. WILLIAM C. MENTZER, District Judges, were called in to sit in place of BEARD, C. J., and BLYDENBURGH, J., who were unable to sit by reason of illness.

POTTER, JUSTICE.

Judge Winter, then Judge of the Sixth Judicial District, having sat as a member of the court upon the submission of this cause, prepared the foregoing opinion prior to his recent retirement from the office of District Judge, upon resigning that office, to be filed as the opinion of the court in the cause. But the absence of a majority of the sitting judges prevented an order disposing of the cause prior to Judge Winter's vacation of his office. The opinion expresses the conclusions of the court upon the questions submitted, and its reasons for disposing of the cause by affirming the judgment, and the same is now ordered filed as the opinion of the court in the cause.

I deem it proper, however, to add something, in a concurring opinion, upon the question of the right of Ida M. Powers to a homestead exemption as against the appellant's judgment, under section 4615, Compiled Statutes, 1910, that section not having been referred to by counsel in any of the briefs.

The appellant's judgment was obtained on February 24, 1914, and was against Ida M. Powers, and her husband, E. E. Powers. At that time the property was encumbered by a recorded mortgage for $1,600, given on June 27, 1910, by one Spracklen and wife, then the owner of the property, to Mary M. Kueny, which, prior to the date of said judgment had been assigned to the plaintiff Bachmann. Prior

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to the date of said judgment also, through mesne conveyances and a sufficient deed to her, Ida M. Powers became the owner of the property, who then and thereafter resided thereon with her husband and their six children until sometime in 1914, subsequent to the date of said judgment, when she sold and conveyed the property, her husband joining in the deed, to Nora L. Hurtt, one of the defendants in the court below and a respondent here, said grantee thereupon entering into possession and occupancy of the premises and residing thereon with her husband and children; and Mrs. Powers and her husband then entering into possession and occupancy of other land contemporaneously conveyed to her by Mrs. Hurtt as a part of the consideration for the sale and conveyance of the property in question; Mrs. Hurtt assuming the Bachmann mortgage, and Mrs. Powers with her husband executing a mortgage to Mrs. Hurtt upon the property conveyed to her for the amount of the Bachmann mortgage. No execution is shown to have been issued or levied upon the land under the appellant's judgment, but the appellant was joined as a defendant in the action to foreclose the Bachmann mortgage, executed by Mrs. Hurtt and her husband upon the land formerly owned by Mrs. Powers to take the place of the original mortgage executed by Spracklen and wife and assigned to Bachmann. And the appellant by answer alleged its judgment and that it constituted a valid and superior lien upon the premises.

The trial court found that the value of the property did not at any time during the period involved exceed in value the sum of $2,500; that the mortgage indebtedness thereon was at all times during said period the sum of $1,600, and at the date of the judgment in this cause amounted to $1,824.66, exclusive of costs; and, as a conclusion of law, that as the mortgage lien and homestead exemption exceeded the value of the land the appellant was without any lien thereon at any time under its judgment.

Preliminary to a consideration of section 4615, under which Mrs. Powers is held by this court to have been entitled to a homestead exemption, it is well to call attention to

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certain other sections of the Code relating to homesteads and judgment liens. The section declaring a homestead exemption in force until 1915, when it was amended by increasing the exemption from $1,500 to $2,500 (Laws 1915, Ch. 104, secs. 2 & 9), provided that every householder being the head of a family, and every resident of the state who has reached the age of 60 years, whether the head of a family or otherwise, shall be entitled to a homestead not exceeding in value the sum of $1,500, exempt from execution and attachment arising from any debt, contract or civil obligation entered into or incurred (Comp. Stat. 1910, sec. 4755). The succeeding section (4756) provides that such homestead shall only be exempt while occupied as such by the owner thereof, or the person entitled thereto, or his or her family, or while the owner is actually living within this state.

Section 4759 provides in substance that when a creditor shall be of the opinion that any homestead is of greater value than $1,500 (now $2,500), on filing an affidavit of that fact with the clerk of the district court, he may proceed against such homestead as in ordinary cases, and if it shall sell for more than $1,500 (now $2,500) and costs, the excess shall be applied to the payment of the demand of such creditor, but in all cases the sum of $1,500 (now $2,500), free of charge or expense, shall be paid to the owner of the homestead; and if it shall not sell for more than $1,500 (now $2,500) and costs, the one instituting the proceedings shall pay all costs thereof, and they shall cease without affecting or impairing the rights of the owner of the homestead.

The next succeeding section (4760) provides that in case of sale of a homestead on execution or otherwise, the proceeds of sale, not exceeding the amount of the exemption, shall be exempt from attachment or levy on execution, and any subsequent homestead acquired by the proceeds thereof, shall also be so exempt, and no judgment or other claim against the owner of such homestead shall be a lien against the same, in the hands of a bona fide purchaser for a valuable consideration.

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A judgment lien is provided for as follows: Section 4683, Comp. Stat., declares that lands and tenements, including vested interests therein, and permanent leasehold estates, renewable forever, and goods and chattels, *not exempt by law,* shall be subject to the payment of all debts, and shall be liable to be taken on execution, and sold as thereinafter provided. It is provided by section 4684 that "such lands and tenements", within the county where the judgment is entered, shall be bound for the satisfaction thereof from the first day of the term at which judgment is rendered; but judgments by confession, and judgments rendered at the same term at which the action is commenced, shall bind such lands only from the day on which such judgments are rendered; and all other lands shall be bound from the time they are seized in execution. Thus a judgment lien without levy of execution, exists under the statute only upon lands and tenements "not exempt by law". So that to give appellant's judgment the standing of a lien upon the land in question while owned and occupied by Mrs. Powers, it must not have been exempt by law, though upon filing an affidavit that the homestead was of greater value than the amount of the exemption, it might have been proceeded against by the creditor under section 4759, subject to the conditions therein stated. The record does not show that any such proceeding was instituted by the appellant in this case. If the property was exempt, then, under the provision of the last clause of section 4760, the judgment would not be a lien against the land in the hands of Mrs. Hurtt, to whom it was conveyed by Mrs. Powers, for she was, without question, a bona fide purchaser thereof for a valuable consideration.

Appellant's only contention upon the question of a homestead exemption in the land in question is that Mrs. Powers was not the head of a family and was not entitled to a homestead exemption for that reason, and that therefore the judgment of the appellant became a lien upon her property subject only to the old Kueny mortgage which had been assigned to Bachmann; but that contention, as well as the

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argument presented in support thereof, entirely ignores the provisions of section 4615, which was adopted as a part of our Code of Civil Procedure enacted in 1886, following the language of original section 5319 of the Ohio Code as published in the Revised Statutes of that state in 1880, which section had been construed by the Supreme Court of Ohio in a case cited in the opinion by Judge Winter, Patrick v. Littell, 36 O. St. 79. That case was decided at the January Term, 1880, and had reference to this provision of the code, though it refers to it by citing the chapter of the Ohio Laws of 1874. by which, through amendment, it became a part of the code. and as so construed it was held to save to the married woman against whom a judgment might be rendered and enforced thereunder as if she were unmarried the same exemptions as are provided for heads of families.

The only question that could possibly arise under that section affecting the right to such exemption would be whether it applies where the wife sues or is sued jointly with her husband. But that was not deemed material in the Ohio case cited, for in that case the action was brought against both husband and wife for services rendered and money paid for them under a contract signed by both of them. And it is clear, we think, that it is immaterial whether the wife is the sole party plaintiff or defendant, or sues or is sued jointly with her husband or with any other person, if it is sought in the action to recover a personal judgment or enforce a personal liability against her. The word "alone" in the phrase "when a married woman sues or is sued alone", is evidently used in the sense of *"feme sole"*, and it was intended to provide that when a married woman sues or is sued as a *feme sole*, or as unmarried, "like proceedings shall be had" &c. It reads: "When a married woman sues or is sued alone, like proceedings shall be had, and judgment may be rendered and enforced as if she were unmarried" &c. The use of the word "unmarried" in that connection seems plainly to indicate that the section was intended to apply to any action brought by or against a married woman as *feme sole*.

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It was not unusual to speak of a married woman as suing or being sued alone, when expressing the thought that she might be sued as if unmarried. The manifest purpose of the provision was to authorize a personal judgment against a married woman in an action brought to enforce a personal liability on her part, and the enforcement of that judgment in the same manner as if she were unmarried. And certainly it could not have been intended that such purpose might be obviated by joining her husband or any other person with her as a party plaintiff or defendant, who might be also liable upon the same contract or for the same debt or obligation.

By amendment in 1884 of the section as it appeared in the Ohio Revised Statutes of 1880 the word "alone" was omitted. But in the act making that amendment a preceding section prohibited joining a husband with his wife in any action except when the cause of action is in favor of or against both of them. That section amended section 4996 of the Ohio Code, and provided: "A married woman shall sue and be sued as if she were unmarried, and her husband shall be joined with her only when the cause of action is in favor of or against both her and her husband." The commission appointed to redraft our code, and which reported the present code to the legislature of 1886, evidently took the section as it was found in the published revision of 1880 of the Ohio statutes, without noticing the amendment of 1884, or deeming it immaterial. But, as explained in the foregoing and in this opinion, the decisions under the provision were the same in Ohio before and after the amendment. Our code did not adopt section 4996 as found either in the Ohio Revised Statutes of 1880 or the Ohio amendatory act of 1884, but instead it was provided in our code that it shall not be necessary to join a husband with his wife as a party except in a case where it would be necessary to join him without reference to the fact of his marriage to such woman (Comp. Stat. 1910, sec. 4314).

Prior to the adoption of our Code in 1886, in view of the provision of the code then in force requiring that when a

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married woman is a party her husband shall be joined with her, except that, when the action concerns her separate property, she may sue alone, and when the action is between herself and husband, she may sue or be sued alone, and the several provisions of the act of December 4, 1869 with reference to married women (Comp. Laws, 1876, Ch. 82), which authorized a married woman to sue and be sued in relation to her property, person or reputation, as if she were sole, and also to sue and be sued as if sole in regard to her trade, business, labor, services and her earnings, the question was unsettled whether the said act of 1869 or the provision of the code applied in suits brought by or against a married woman, even as to those cases provided for in said act of 1869. (See Granger v. Lewis Bros., 2 Wyo. 231.) A dissenting opinion in that case held that the Married Woman's Act, in the respect indicated, was not repealed by implication by the code of 1873 containing the provision aforesaid requiring a husband, except in the two cases mentioned, to be joined with his wife as a party. But the majority opinion held that it was unnecessary to determine the effect of said Married Woman's Act, holding, however, that the trial court erred in taking from the jury the issue as to the coverture of the defendant at the time of the transaction involved in the suit and the institution thereof.

Section 4615 aforesaid granting to a married woman under a judgment rendered against her the benefit of all exemptions to heads of families is in line with a provision of the debtor exemption statutes with respect to personal property which has been in force since 1871. Personal property of any kind or character to be selected by a debtor, being the head of a family and residing with the same, not to exceed the value of $500, is declared to be exempt, and it is then provided: "That in any case where the property before mentioned shall be the sole and separate property of the wife, it shall, to the same extent and for all purposes, be exempt for the debts of the wife" (Comp. Laws 1876, Ch. 48, secs. 2 & 4; Comp. Stat. 1910, secs. 4762, 4763).

Having concluded that the trial court properly found that

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Mrs. Powers was entitled to a homestead exemption in the premises under the provisions of section 4615, it is not necessary to consider whether she would be entitled to such exemption under the provisions of the homestead statutes standing alone, or whether her husband would be entitled to such an exemption in the property held in her name. That property held in the wife's name might be a homestead, at least when conveyed to her by her husband, seems to have been the view of the court when deciding the case of North Platte Milling Co. v. Price, 4 Wyo. 293. In that case, where the property had been conveyed to the wife pursuant to an ante-nuptial contract, but after the husband had become indebted, and a creditor attacked the conveyance as fraudulent, the court, by Conaway, J., said: "The property was and is a homestead and not subject to sale on execution in the ordinary way. To the amount of $1,500.00 it is exempt." (See also Arp v. Jacobs, 3 Wyo. 489; 21 Cyc, 501, 507.) But it is not intended to decide the question in this case, nor is it clearly presented here by the findings or briefs. And of course but one homestead exemption in this property could be allowed.

The conclusion of the trial court that the amount of the prior mortgage lien should be first deducted from the value of the land in ascertaining the extent of the exemption, and that the exemption should be allowed as to the excess, is not questioned here, but that conclusion is amply supported by authority and is, I think, in accord with the spirit and a reasonable construction of our homestead statutes (21 Cyc. 492; 15 Am. & Eng. Ency. L. 692; Kilmer v. Garlick, 185 Ill. 406; Reames v. Morrow, 193 Ill. App. 155; Meyer v. Nickerson, 101 Mo. 184; Houf v. Brown, 171 Mo. 207; Hoy v. Anderson, 39 Neb. 386; Prugh v. Portmouth Sav. Bank, 48 Neb. 414; Morrill v. Skinner, 57 Neb. 164; Crosby v. Anderson (Utah), 162 Pac. 75; in re. Barrett's Est., 140 Fed. 569; Hinson et al. v. Adrian et al., 92 N. C. 121; White v. Fulghum, 87 Tenn. 281; White v. Horton, 154 Cal. 103, 97 Pac. 70, 18 L. R. A. (N. S.) 490, & note, citing cases).

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KONOPISOS v. STATE.

(No. 934; Decided Dec. 1, 1919; 185 Pac. 355.)

DISORDERLY HOUSE—ELEMENTS OF OFFENSE—SUFFICIENCY OF EVIDENCE—CRIMINAL LAW—CORROBORATION OF CONFESSIONS AND ADMISSIONS INSUFFICIENT TO CONVICT—WITNESS'S IMPEACHMENT—CROSS EXAMINATION AS TO OTHER OFFENSES—OBJECTIONS TO JURISDICTION FIRST RAISED ON APPEAL.

1. In order to convict for the offense of keeping a house of ill fame as defined by Comp. Stat. 1910, Sec. 5909, the state must prove the house in question to be a house of ill fame, or bad repute, resorted to for the purpose of prostitution or lewdness, and that defendant kept the house, aided in keeping it, or was interested in it.
2. In a prosecution for keeping a house of ill fame, evidence held, insufficient to sustain conviction.
3. The *corpus delicti* cannot be established by extra-judicial confessions or admissions unsupported by other evidence, nor are such admissions alone sufficient to support a conviction.
4. One cannot be convicted of keeping a house of ill fame, under Comp. Stat. 1910, Sec. 5909, alone upon admissions made by him; there being no other evidence tending to prove the elements of the offense.
5. In a prosecution under Comp. Stat. 1910, Sec. 5909, for keeping a house of ill fame, it was prejudicial error to permit the state on cross-examination of defendant to ask if he had not been arrested and convicted of being a pimp, to which he answered "Yes", over objection; such matter having no connection with the offense charged.
6. An objection that the trial court had not jurisdiction to consider an information as an original case, there being an appeal pending in the court from the conviction of the identical offense, cannot be raised for the first time on appeal.

ERROR to District Court, Platte County, HON. WILLIAM C. MENTZER, Judge.

Tony Konopisos was convicted of keeping a house of ill fame, and brings error.

Oscar O. Natwick and *Marion A. Kline,* for plaintiff in error.

The evidence was insufficient to prove the elements of the offense; the crime is statutory, and the essential elements

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are, 1st, that the house in question was a house of ill fame, 2nd, that it was resorted to for prostitution, 3rd, that it was kept by defendant at, or about the time mentioned in the information (People v. Russell, 67 N. W. 1099; People v. Wheeler, 105 N. W. 609; State v. Harberlee, 33 N. W. 462; Drake v. State, 17 N. W. 117; People v. Pinkerton, 44 N. W. 181; People v. Gastro, 42 N. W. 939); extrajudicial statements and admissions of defendant are insufficient to establish the corpus delicti (People v. Simonson, 40 Pac. 440; Wistrand v. People, 72 N. E. 748; Grey v. Com., 101 Pa. 380; U. S. v. Boese, 46 Fed. 917). The court erred in allowing the prosecuting attorney to ask defendant whether he had not been convicted of being a pimp, and compelling him to answer the question. The verdict and judgment are unsupported by any evidence; the conviction was for a misdemeanor that had already been tried in Justice Court; the record shows that defendant was tried for the same offense before a justice of the peace, who rendered a judgment of conviction from which an appeal was taken to the district court; the district court was without jurisdiction to hear and determine the case on original information that was already pending before it on appeal from a prior conviction in justice court; this court should set aside the second conviction for want of jurisdiction.

D. A. Preston, Attorney General, for defendant in error. The record does show a former conviction for the same offense in Justice Court, which was pending on appeal there at the time of this conviction; general assignment that the judgment is contrary to law is insufficient (Miller v. State, 3 Wyo. 657); defendant admitted his guilt in the presence of witnesses; this was sufficient to sustain conviction; there being some evidence to sustain conviction, it will not be set aside on appeal; errors of law must be specified with particularity; this has not been done (Foster v. State, 59 Ind. 481; Edmonds v. State, 34 Ark. 734; Sweet v. State, 90 Ga. 315; Benson v. State, 119 Ind. 483); the errors complained of are too vague and indefinite for consideration by

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this court; the assignment of error on account of a former conviction in Justice Court, comes too late when raised for the first time on motion for a new trial.

BLYDENBURGH, JUSTICE.

The defendant was convicted by the verdict of a jury "of keeping a house of ill fame resorted to for the purpose of prostitution or lewdness". A motion for a new trial was duly made and denied, and the case is brought here on error.

The alleged errors, while eleven in number, may all be considered under the following heads:

1. That there was no competent evidence introduced to prove the necessary elements of the alleged offense.

2. That alleged admissions or extra judicial confessions of the defendant were improperly admitted in evidence without any other evidence of the corpus delicti.

3. That certain other evidence was wrongfully admitted on behalf of the prosecution.

4. There being an appeal pending in the same court from a conviction before a justice of the peace of the identical offense charged, the court could not assume and exercise original, but only appellate jurisdiction.

Before the trial in the court below, the County and Prosecuting Attorney filed a motion to *nolle pros* the information on the ground that the evidence obtained by the prosecution was insufficient to convict the defendant of the crime charged. This motion was denied by the court, and at the argument of the case in this court the Attorney General did not combat the position of the defendant but confessed the errors complained of, and deplored the fact that his time and the time of this court should be taken up by such cases which should have been dismissed in the lower court.

The statute under which the information in this case was drawn is section 5909 of the Wyoming Compiled Statutes of 1910, and is as follows:

"Whoever keeps a house of ill-fame, resorted to for the purpose of prostitution or lewdness; or knowingly lets a house to be so kept; or knowingly permits a house which

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he has let to be so kept, shall be fined not more than one hundred dollars, to which may be added imprisonment in the county jail not more than six months."

This is a statutory offense and the essential elements that the state must prove before conviction can be had are:

1. That the house in question is a house of ill-fame,—that is, that it is a house of bad repute or evil notoriety.

2. That it is resorted to for the purpose of prostitution or lewdness.

3. That the defendant kept the house, aided in keeping it, or was interested in it. (State v. Haberle, 72 Ia. 138, 33 N. W. 461; People v. Pinkerton, 79 Mich. 110, 44 N. W. 180; Drake v. State, 14 Nebr. 535, 17 N. W. 180; People v. Russell, 110 Mich. 46, 67 N. W. 1099; People v. Wheeler, 142 Mich. 212, 105 N. W. 607.)

The evidence on behalf of the state consisted of the testimony of the prosecuting witness, Daniel S. McCorkle, and his wife, Mrs. McCorkle, who testified to a lengthy conversation with the defendant in the front part of his saloon at Hartville, Platte County, Wyoming, the premises alleged to be kept by the defendant as a house of ill-fame, in which conversation certain statements of the defendant are claimed to be admissions of guilt of the offense charged, and in addition the testimony of one Manual Stamnolajais, who accompanied the McCorkles on the occasion of the conversation. While the conversation is testified to as extending over an hour,—it seems that the McCorkles went to the saloon to persuade the defendant to send away girls they claimed he was keeping in connection with his saloon,—the substance of the alleged admisions is that the defendant said he was keeping the girls as a protection to the decent women of the community and they were his girls. McCorkle also testified that during the conversation, which was in the front part of the saloon, only separated by screen doors from the rest of the saloon, he heard a woman talking, "a distinctly feminine voice" in the back part of the saloon, and Stamnolajais testified that he saw one girl in the back of the

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saloon at the time of this conversation. No other evidence was introduced on behalf of the prosecution.

It appears from the evidence on behalf of the defendant that there existed in Hartville a property generally known as Fletcher's Opera House, which was owned by C. D. Fletcher, who was sworn as a witness on behalf of the defendant, and covers altogether four lots. This property consisted of three parts: a theatre, a hotel with ten to fifteen rooms, and the saloon or bar room part; that the defendant rented the bar room and ran his saloon in it and this bar room was entirely separate from the hotel part of the premises, except that there was a door from the bar room into a hall of the hotel. Fletcher had rented, by a written lease, the hotel part to one Eva Brice to be run as a hotel covering the time alleged in the information, and Eva Brice had paid him the stipulated rent covering this time, which was evidenced by receipts introduced in evidence; that the defendant did not have anything to do with the hotel part nor any business connection with Eva Brice, and did not even room at the hotel or saloon, but some two blocks from the saloon and hotel. That the girls referred to in the state's evidence stayed in the hotel and that Eva Brice had plead guilty before the police judge to running a house of ill-fame and Fletcher, who was away in Montana at the time, upon his return and learning of it compelled her to move out. There is no evidence in the record as to the reputation of the saloon run by the defendant being disorderly or otherwise, no evidence that it was resorted to for prostitution or lewdness by anyone. This is not a case in which there is a conflict of evidence, and the jury in its province might reject some and believe other evidence, but there is an absolute absence of evidence to substantiate the charge.

It is a well established principle of criminal law by the overwhelming weight of authority that the *corpus delicti* cannot be established by extra judicial confessions or admissions unsupported by other evidence. (7 R. C. L. 777). Nor are such admissions sufficient alone to support a con-

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viction (16 C. J. 628). And should not be allowed to go to the jury until other evidence sufficient to go to the jury on the question of the *corpus delicti* has been introduced by the state. In this case there was no evidence tending to prove the elements of the offense outside of the alleged admissions of the defendant, and these are such that if true, and the defendant denied he made them, are not sufficient to prove the offense charged.

As to the errors in the admission of evidence there seems to have been a tendency to get before the jury any evidence which would go to show that the defendant was not a person of upright or moral character, but it is not necessary to refer to all of the instances pointed out in defendant's brief. One will be sufficient to illustrate them all. On cross-examination the defendant was asked if he had not been arrested and convicted of being a "Pimp", and over objection was compelled to answer Yes! This had no connection with the offense charged nor with anything brought out in his direct examination and it was shown to have been after he had ceased running his saloon by reason of his license having expired. That his conviction of this offense was brought to the attention of the jury merely to prejudice it against him is evident and was error. In the case of People v. Pinkerton, *supra,* which was a prosecution for a like offense in Michigan under a statute identical with ours, Judge Campbell, speaking for the court, said:

"All testimony, even of conviction, and not merely of accusation of crimes or misconduct not in issue, is improper. It raises false issues, and is likely to lead a jury to try the accused of what is not in the information. This doctrine is elementary, and has been too frequently held to need citations. * * * ; and, in a criminal case, we do not think it competent to compel a respondent who is a witness to answer questions, irrelevant to the issue, having a tendency to bring in other charges. Whatever latitude is proper in cross-examination to test veracity, it cannot properly introduce independent issues, against the person who is both witness and respondent."

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As to the last head of error that the court had no jurisdiction to consider the information as an original case, there being an appeal pending in the court from a conviction for the identical offense, it is only necessary to say that the record does not disclose that this matter was raised before or during the trial in the court below, either by plea in bar or in any other manner and was therefore waived.

It was intimated in the argument that the conviction in this case was largely due to the complaint of the state of affairs at Hartville and the immoral atmosphere surrounding the defendant and others at that town and from the record in this case we can well believe that the verdict of the jury was the result of prejudice adduced by some such conditions. But however disreputable the defendant may be, courts must see that when he is brought to trial for a criminal offense that he is protected by the safeguards that the constitution and laws of the land surround him with, and is only convicted after a fair trial on competent evidence and under the well established rules of criminal law and procedure, no matter how obnoxious is the offense that he is charged with. Anything else would be to tear down the safeguards to innocent persons charged with any kind of criminal offense.

The judgment will be reversed with direction to the lower court to grant the defendant a new trial.

Reversed.

BEARD, C. J., and POTTER, J., concur.

CARSTENSEN v. BROWN.

(No. 979; Decided Dec. 18, 1919; 185 Pac. 567.)

APPEAL AND ERROR—RECORD NEED NOT SHOW NOTICE TO JUDGE—EVIDENCE—PRESUMPTION OF NOTICE GIVEN BY CLERK—ADVERSE POSSESSION—BOUNDARIES—ESTOPPEL.

1. The direct appeal statute, Laws 1917, Chapter 32, Section 10, does not require the record to show that the Clerk

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notified the Judge within five days after specifications of error are filed in his office, that the record on appeal is perfected. It is made the duty of the Clerk to give such notice and in the absence of a showing to the contrary, it will be presumed that he performed the duty.

2. Statement of plaintiff's adjoining landowner to a purchaser of his land that a certain fence was the true boundary line, was not binding on plaintiff, so as to estop him from denying that such line was the true boundary line; such statement being made without his knowledge or assent.

3. Where adjoining landowners were both ignorant as to the true boundary, and each had an equal opportunity to ascertain the facts, but failed to do so, one of them was not estopped to deny that a fence was the true boundary line, by reason of the other making improvements on the subsequently disputed strip.

APPEAL from District Court, Washakie County; HON. P. W. METZ, Judge.

Action by Henry A. Carstensen against Earl Brown to recover possession of lands involved in a disputed boundary. There was judgment for defendant and plaintiff appeals.

H. W. Rich, for appellant.

The motion to dismiss is not well taken; the statute, Sec. 10, Chapter 32, Laws 1917, does not require the record to show notice to the Judge; there is a contrary inference since the section requires the record to be made up and filed before such action be taken by the Clerk; adverse possession cannot be predicated upon a mistake as to the true boundary line; the appellant is not estopped from asserting his rights by reason of statements made by adjoining land owners; he is not bound by a mistake as to the true boundary (Bayton v. Waters, 177 Pac. 525; Fieldhouse v. Leisburg, 15 Wyo. 207; Skinner v. Crawford, 54 Iowa 119; Crawford v. Hebrew, 96 Pac. 348; Mfg Co. v. Packer, 129 S. W. 760; Scott v. Williams, 87 Pac. 550; Treese v. Ass'n, 122 Fed. 598), and other cases cited in the brief show the rule to be universal (Brownlee v. Williams, 77 Pac. 250); the Government survey under which plaintiff claims, stands unchallenged, and must control (Vincent v. Blanton, 85 S.

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W. 703; Colonization Co. v. Flipper, 29 S. W. 813); estoppel does not arise from silence or inaction, unless the claimant knows there is occasion to speak or act (Griffin v. Nichols, 51 Mich. 575); especially when the means of knowledge is equally open to both parties (Cantley v. Morgan, 51 W. Va. 304); intruction No. 1, given by the court, is misleading and prejudicial; instruction No. 5 did not state the law with reference to estoppel; the court erred in refusing instruction No. A (Betz v. Mathiowitz, 72 Minn. 443); the court erred in refusing to instruct the jury on the statute of limitations (Sutton v. Clark, 82 Am. St. Rep. 853); defendant's evidence shows that plaintiff was estopped from asserting his rights to the land; defendant's affirmative defenses were sustained; the verdict of the jury is contrary to law and the evidence.

C. H. Harkins and *H. C. Brome,* for appellee.

The record fails to show notice by the Clerk to the Judge, and the appeal should be dismissed; appellee failed to prove ownership of the land in controversy; plaintiff must recover upon the strength of his own title, and in this he failed; the original government corners are controlling (9 Corpus Juris 164; Craigon v. Powell, 128 U. S. 691; U. S. Comp. Stat. 1918, Sec. 4803); field notes are competent to establish lost corners (Galbraith v. Parker, 153 Pac. 283; Washington Rock Co. v. Young, 290 Utah 106; Stangair v. Roads, 41 Washington 583; Ogilvie v. Copeland, 145 Ill. 98; Read v. Bartlett, 255 Ill. 76); appellant is estopped to claim land lying east and north of the boundary fence occupied by defendant by his own silence and inaction (Hayes v. Livingston, 34 Mich. 384); the question of adverse possession was properly submitted to the jury; the authorities are in conflict as to whether adverse rights may be established under a mistaken belief; the cases are reviewed in the Idaho case of Bayhouse v. Urquides, 105 Pac. 1066, but there was no mistake in the present case (Allen v. Lewis, 177 Pac. 433; Fieldhouse v. Leisburg, 15 Wyo. 207; Bryant v. Cadle, 18 Wyo. 64).

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BEARD, CHIEF JUCTICE.

In this case the parties occupy the same relative positions as in the District Court and will be referred to as plaintiff and defendant.

Plaintiff has the legal title to the SE¼ of the SW¼ of section 21, and the NE¼ of the NW¼, and the W½ of the NE¼ of section 28, Tp. 48 N., R. 89 W. of the 6th P. M. Defendant has the legal title to the E½ of the NE¼ of section 28, and the S½ of the SE¼ of section 21, in said township and range. Plaintiff brought the action against the defendant, alleging that defendant wrongfully kept him out of possession of his said lands. Defendant answered, alleging, in substance, that in 1901, plaintiff's grantor, one Oscar McNay, entered the land described in plaintiff's petition as a homestead, and during said year established the boundary line between said land and the land lying to the east and north thereof, and now owned by defendant, by building a fence along said boundary line. That in 1904 McNay obtained a patent for said land and conveyed the same to the plaintiff, who immediately thereafter took possession of the land lying west and south of said boundary line and has resided upon and cultivated the same since that time. That about 1902, one William Greet entered the land, now owned by defendant, as a homestead. That Greet was advised that the fence established by McNay was the true boundary line between said lands. That in the latter part of the year 1904, defendant purchased the improvements on the land entered by Greet, who thereupon relinquished his filing, and defendant filed on the same as a homestead. That defendant had no information or knowledge respecting the boundary line between said lands other than the information conveyed to him by Greet, which was that the fence above mentioned was the true boundary line between said tracts. That relying on the statements of Greet and the fact that he was in possession of all the land lying immediately east and north of said fence and cultivating and farming the same, was induced to and did pay Greet $1,000.00 for his improvements, and thereafter filed thereon as a homestead, and

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from the year 1905 has been continuously in the open, notorious, visible and exclusive possession of said land, irrigating, cultivating and using all of said land lying east and north of said fence, and had made valuable improvements thereon. That he obtained a patent for the said E½ of the NE¼, Sec. 28, and S½ of the SE¼, Sec. 21, in April, 1914. That plaintiff maintained said fence as the true boundary line between the respective tracts and never asserting any claim or right to the land east and north of said fence. He pleads an estoppel, and also title by adverse possession. The reply admitted that defendant had no information or knowledge of the true boundary line. Admitted that defendant made homestead entry as alleged, and that he had been in possession of the land described in his homestead entry since the date of making the same. Denied the other allegations of the answer.

The case was tried to a jury which returned a verdict in favor of defendant. A motion for a new trial was denied and judgment entered on the verdict, and plaintiff appeals.

The defendant has filed a motion to dismiss the appeal for the reason and on the ground that it does not appear from the record on appeal that the judge of the District Court, before whom the action was tried, was notified in writing, or at all, that the record on appeal in the case had been perfected and was on file in the office of the clerk of the District Court, as required by section 10, chapter 32, S. L. 1917. Said section provides, "The Clerk of the District Court shall, within five days after the specifications of error are filed in his office, notify the judge of the District Court before whom the action was tried, in writing, that the record on appeal in the cause is perfected and on file in his office," etc. There is nothing in the statute requiring that the record on appeal shall show that such notice was given. Also the record on appeal must be perfected and filed in the office of the clerk of the District Court before the notice is to be given, and, therefore, the notice could not be a part of such record. The clerk is presumed to have done his duty by giving the notice, at least in the absence of any showing to

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the contrary. The motion to dismiss the appeal, therefore, is denied.

The controversy in this case is over a strip of land between a certain fence and the boundary line between the lands to which the respective parties have the legal title, and contains about fifty acres. There is not much conflict in the evidence, which is to the effect, that, prior to 1903, and probably in 1901, one McNay made homestead entry on the land to which plaintiff has the legal title, and built the fence. It appears that very few, if any, of the monuments marking the original government corners in the townships in which these lands are situated could be found, and McNay had a line run by a surveyor from a supposed quarter section corner presumably on the north line of the township (as McNay testified that the surveyor called it a correction line) "down" some distance but found no established corners. He then told McNay to look through the instrument and step off a half mile and he would come to his east line; and it was in that manner McNay located the fence, determining the course north and south, as he says, by the shadow of the sun at noon. He says that the fence was not built with reference to government corners because none could be found. In 1904 or 1905 McNay sold and conveyed the land to plaintiff and another, and shortly thereafter plaintiff acquired the full title. In 1903, one Greet filed on the land to which defendant now has the legal title, and in 1904, defendant bought his improvements and he relinquished and defendant filed on the land as a homestead and has since been in possession and has irrigated and cultivated the strip in controversy, or a part of it, up to the fence. Greet testified that he showed defendant the land "he naturally supposed was on the place." Did not show him any boundary lines of the place. Had no conversation with him about the fence. Supposed that the fence was the line, but did not know whether it was or not. Only claimed the land because he thought it was part of his homestead. Defendant testified that Greet told him the fence was the line. That he claimed to own to the fence; but on cross-examination stated, "I am

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claiming that land because I thought that was the land I was filing on." After repeating that statement his attorney asked him the question, "And you may state whether or not, Mr. Brown, at all times since you have been there you have intended to claim and hold the land to that fence whether it was the true line or not? A. Yes, sir." He further testified that he claimed the land because he had been in possession for more than ten years. That he never knew where the line was. That he found out soon after he filed on the land that there was a question about the line. That he was told the line might be east of the fence. There is no evidence that either plaintiff or his grantors ever stated or represented to defendant that the fence was the boundary line. He never paid taxes on any land except that described in his patent, while plaintiff paid the taxes on the land to which he has the legal title. There is no evidence that the fence was ever established as the boundary between their premises by the parties by agreement, or that they ever had any conversation about it. H. J. Arnoldus testified that he had two or three buyers who would have bought the place if they could have located the line, that the question of the line always came up. That in June, 1917, he asked defendant if he had the land surveyed when he got it so that he would be located through a surveyor, and he said no, he just took what was left, he supposed that that fence was about the line. Plaintiff testified that government corners could not be found and that he did not know where the boundaries of his land were until 1918. It appears that during that year Alex. Douglas, a United States surveyor, by direction of the Assistant Supervisor of Surveys, was assigned to make a re-survey of Township 48, Range 89 West of the 6th P. M., according to special instructions given him by the Surveyor General for Wyoming. He testified that he made a survey accordingly, the purpose of which was to restore the section lines in a position as near as possible as they were originally laid down by the original survey, which he did. It is upon that survey that plaintiff bases his claim. Defendant further testified that the ditch which carried

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water to irrigate the land in dispute, and as we understand the evidence other lands of plaintiff and defendant, was completed in 1904 and 1905, and was built jointly by the parties (and perhaps others) as he states, "Why we all helped build it." That he did not make the application for water right. That in 1908, plaintiff, defendant, and one Utiger broke up some new land, some on defendant's place and some of plaintiff's, as partners, sharing the crop equally. (The record fails to show where this land was situated.) Utiger testified that in 1908, plaintiff stated to him that "if he would set the line or, if the line would be on the place it belonged he would probably take in half the place of Mr. Brown." Plaintiff denied ever having made such statement. The foregoing statement, we believe, contains the substance of the material evidence in the case.

We do not consider the evidence sufficient to sustain the defendant's claim to the strip of land in controversy by prescription. He repeatedly testified that he claimed it because he thought it was a part of the land upon which he had filed and for which he afterwards received a patent. It is true that in answer to a leading question he stated that he intended at all times to claim and hold to the fence whether it was the true line or not; but that statement is in direct conflict with his former repeated statement, and inconsistent with an honest purpose. We are not convinced that it was his deliberate intention to take from his neighbor between forty and fifty acres of land to which he had neither title nor right; but, on the contrary, to take only that described in his entry and patent; and that in taking possession of the strip he did so under the mistaken belief that it was a part of the land he had entered, and without intention of claiming beyond the true boundary thereof. Giving to the evidence the full probative force to which it is entitled, the case on that point comes within the rule announced by this court in Fieldhouse v. Leisburg, 15 Wyo. 207, 88 Pac. 214, followed in Allen v. Lewis, 177 Pac. 433.

The defendant also pleads an equitable estoppel, alleging that in 1901 plaintiff's grantor established the boundary line

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between his said land and the land lying to the east and north thereof, by building a substantial fence along all of said boundary line, and that plaintiff has since that time maintained said fence as the true boundary line between said tracts, and at all times acquiescing in and agreeing to the boundary line as established by his grantor. There is some apparent conflict in the adjudicated cases arising from difference in the evidence in the several cases, and it has frequently been said that no hard and fast rule can be laid down, but each case must be governed by the facts of the particular case. There are certain well defined and established rules applicable to all cases. The requisites of an estoppel in pais, or equitable estoppel are stated in 2 Pomeroy's Equity Jurisprudence, sec. 805, as follows: "(1) There must be conduct—acts, language, or silence—amounting to a representation or concealment of material facts. (2) These facts must be known to the party estopped at the time of his conduct, or at least the circumstances must be such that knowledge of them is necessarily imputed to him. (3) The truth concerning these facts must be unknown to the other party claiming the benefit of the estoppel, at the time when such conduct was done, and at the time when it was acted upon by him. (4) The conduct must be done with the intention, or at least with the expectation, that it will be acted upon by the other party, or under such circumstances that it is both natural and probable that it will be so acted upon." And in 11 A. & E. Enc. Law (2nd Ed.) 434, "It may be stated as a general rule that it is essential to the application of the principle of equitable estoppel that the party claiming to have been influenced by the conduct or declarations of another to his injury, was himself not only destitute of knowledge of the state of facts, but was destitute of any convenient and available means of acquiring such knowledge; and that, where the facts are known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel." This last quotation is taken almost literally from Brant v. Virginia Coal & Iron Co., 93 U. S. 326, 23 L. Ed. 927, and cases from many states

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are cited in the notes. To the same effect see 16 Cyc. 738, 10 R. C. L. 695; L. J. Upton & Co. v. Ferebee, 100 S. E. 310 (N. C. 1919); Foard v. McAnnelly, 215 Mo. 371, 114 S. W. 990.

Applying these rules to the evidence in this case, was there sufficient substantial and credible evidence to support the verdict and judgment; and was the jury correctly instructed as to the law of estoppel? Upon that branch of the case the court instructed the jury as follows:

"You are instructed that if plaintiff's grantor established the fence shown upon the maps in evidence as the eastern boundary of his land and plaintiff purchased said land and entered into the occupation of it, knowing that said fence had been built and was being maintained and kept in repair as the eastern boundary line of plaintiff's land, and in 1908 knew that said fence was some distance west of the correct boundary, and if you further find that after the establishment of said line and the construction of said fence, the defendant purchased the improvements upon and acquired title to the tract of land lying immediately east and north of plaintiff's land, believing and having good cause to believe that said fence was the true line between said tracts and if you further find that defendant has, with the knowledge and acquiescence of plaintiff occupied, cultivated and used and placed valuable improvements on the land lying immediately east and north of said fence continuously for the past fifteen years, then you are instructed that plaintiff is estopped from maintaining or claiming that the boundary line between said tracts of land is east and north of the place where said fence is now located and your verdict should be for the defendant."

There is no evidence in the record that plaintiff's grantor (McNay) established the fence as the eastern boundary of his land. He testified that the fence was not built with reference to government corners for the reason that they could not be found, and stated the manner in which he attempted to approximate the line; but there is no evidence that he at any time stated or claimed it as the true line. It must be

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borne in mind that we are here considering the question of estoppel in the absence of any specific agreement between the parties that the fence should be regarded as the true line between their respective lands, and it does not appear that at the time defendant purchased the improvements from Greet, and which he supposed to be on the land filed on by Greet, that any of the parties knew the location of the true line. Nor does it appear that plaintiff knew where the true line was until the survey in 1918. Assuming, for the purposes of the case, that he stated to Utiger in 1908 that "if he would set the line or if the line would be on the place it belonged he would probably take in half the place of Mr. Brown," does not show that he then knew its true location. The evidence fails to show when the improvements defendant claims to have put on the land were made, but tends to show that it was prior to 1908, at which time plaintiff was ignorant of the true location of the line between their lands; but it is perfectly apparent that each had equal opportunity and facilities for learning the truth. No statement by Greet as to the location of the line made without the knowledge or assent of plaintiff could bind him; and had defendant inquired of McNay or plaintiff he could have learned the facts, or he could have had his land surveyed. There is no evidence in the record showing that defendant made the improvements or did any act to his detriment in reliance upon any act or statement of the plaintiff. Not only that, but he admits that soon after he filed on the land he was told that the line might be east of the fence. Both parties being ignorant of the true location of the line between their lands, and each having equal opportunity to ascertain the true location of the line, under the rules above stated the defendant is not, for that reason also, in a position to invoke the doctrine of equitable estoppel.

The instruction given to the jury, we think, was calculated to mislead and probably did mislead the jury. It stated only a part of the law applicable to the evidence, and they should also have been told, in effect, that if they found from the evidence that the parties were both ignorant as

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to their true boundary, and that before making the improvements, if any, by defendant which he claims to have made he had an equal opportunity to ascertain the facts but failed to do so, he cannot invoke the doctrine of equitable estoppel. The evidence in the record is not as satisfactory as we would like, but taken in connection with the omission in the instruction, equity and good conscience require a reversal of the judgment, and that the cause be remanded for a new trial, and it is so ordered. *Reversed.*

POTTER, J., and BLYDENBURGH, J., concur.

WATTS v. LAWRENCE.

(No. 959; Decided Dec. 18, 1919; 185 Pac. 719.)
(Rehearing denied March 15, 1920.)

WILLS—TESTAMENTARY CHARACTER OF INSTRUMENT—DEED CONVEYING PRESENT INTEREST HELD NOT TESTAMENTARY IN CHARACTER—JUDGMENT—EXECUTORS AND ADMINISTRATORS—PRESENTATION OF CLAIM BEFORE SUIT—LIMITATION OF ACTIONS—NECESSITY OF PLEADING STATUTE OF LEMITATIONS—PLEADING—ALLEGATION OF COMPLIANCE WITH CONDITIONS.

1. A deed of warranty in due form, delivered in the life time of the grantor, but directing payments by grantee to persons therein named, within one year after decease of grantor, held, not testamentary in character.
2. The usual test applied to determine whether an instrument is a deed or a will is, whether or not it passes a present interest or estate. If it creates or vests in the grantee a present estate, even though that estate be one which cannot be enjoyed until the death of the grantor, it is a deed.
3. A deed from a mother to her son in form a warranty deed, directing that the grantee shall, within one year after grantor's death, pay certain sums to certain persons, "and upon filing receipts from the above-named persons, then this deed to be of full force and effect, otherwise to be null and void," held, a deed creating a present interest in the grantee at the time of its execution.
4. In an action to determine the right to money paid by a municipality in condemnation of realty alleged to have

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been granted by plaintiff's decedent to defendant, but erroneously described in the deed it was not necessary for the trial court, in determining that title passed under the deed, to decree formal reformation to correct the description in the deed, so as to include the land in controversy.

5. Where land deeded by plaintiff's decedent to defendant was condemned by a municipality, and the condemnation money placed in the hands of a stakeholder pending a determination of the rights of the parties, presentation of a claim to the executor was not a condition prerequisite to the commencement of suit to recover such money; the owner of the land being the owner of the condemnation money.
6. A defendant's failure to raise the statute of limitations either by demurrer or answer constitutes a waiver of the defense.
7. In a suit to recover money deposited with a stakeholder in payment for land condemned by a municipality, title to the land being in controversy as between defendant and plaintiff, under a deed directing plaintiff to make certain payments after the grantor's death, plaintiff, having alleged that he was the absolute owner of the money, was under no necessity of alleging compliance with the directions of the deed as a condition precedent.

ERROR to the District Court, Laramie County; HON. JOHN R. ARNOLD, Judge.

Ray E. Lee, for plaintiff in error.

Plaintiff below did not present its claim to the administrator before suit; this is a pre-requisite to recovery by action (5616 C. S.; O'Keefe v. Foster, 5 Wyo. 343; Snyder v. State, 5 Wyo. 318); the petition does not allege such presentation nor disallowance; there is no presumption of rejection (O'Keefe v. Foster, *supra*, Morse v. Steele, 26 Pac. 693; Pratt v. Hunt, 41 Pac. 12; Bank v. Charles, 24 Pac. 1019; Burke v. Maguire, 98 Pac. 21; Willis v. Booth, 91 Pac. 759); there was an error of description in the deed which was not reformed by action; this should be fatal to recovery (5623 C. S.); reformation sought in the amended petition comes too late and, moreover, there was no evidence of mutual mistake to justify a reformation (Stoll v. Nagle, 15 Wyo. 86; Grieve v. Grieve, 15 Wyo. 358); the intention of the parties governs in construing a deed (Wolfe v. Scar-

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borough, 2 O. St. 361; Banlos v. Ash, 19 Ill. 187); the instrument must be construed as a whole (Hamner v. Smith, 22 Ala. 433; Bruensmann v. Carroll, 52 Mo. 313); effect must be given to the entire instrument (Barnes v. Haybarger, 53 N. S. 76); written language inserted will prevail over the printed form of a deed (McNear v. McComber, 18 Iowa 12; Reed v. Hatch, 55 N. H. 327), and words given their natural meaning (Bradshaw v. Bradbury, 64 Mo. 334); there was failure to prove performance of conditions precedent (Stockton v. Weber, 98 Cal. 433, 33 Pac. 332); payments directed by the deed are a condition precedent (Re. Jones, 123 Mich. 505, 48 L. R. A. 580); unless the petition avers performance of conditions precedent, there can be no recovery (Albers v. Co., 66 N. W. 1040; Weeks v. O'Brien, 36 N. E. 185); the instrument recites a nominal consideration, a circumstance favoring forfeiture, unless conditions are shown to have been performed (70 Am. St. Rep. 731, 58 O. St. 67; 50 N. E. 99); if the instrument was not delivered in the life time of the grantor, a bona fide purchaser could take no title (Stone v. French, 37 Kan. 145, 14 Pac. 530); failure of delivery by the maker in her life time gives the instrument testamentary character; but in the present case the instrument is void as a will because improperly executed; grantor died with the deed in her possession, which is strong evidence of no delivery (Vrseland v. Vrseland, 48 N. E. Eq. 56); ignorance of mistake in description in a deed is no excuse (Foster v. Manefield & Coldwater R. 146 U. S. 88; Netzel v. Co., 65 Fed. 23); there can be no reformation without a showing of meritorious consideration (Pomeroy's Eq. Rem. 679); admissions alone are insufficient to establish a claim against an estate (Clark v. Roberts Estate, 87 Pac. 1077); the covenant of seizin was broken when made (Abbott v. Allen, 14 Johns. (N. Y.) 253, 7 Am. Dec. 554; Adams v. Conover, 87 N. Y. 422, 41 Am. Dec. 381; Downer v. Smith, 38 Vt. 464, 76 Am. Dec. 148; Clark v. Conroe, 38 Vt. 471; Clement v. Bank, 17 Atl. 717; Brandt v. Foster, 5 Cl. (Iowa) 295; Van Hagner v. Van Nostrand, 19 Iowa 427; Zent v.

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Bicken, 54 Iowa 525; Maupin on Marketable Title, 259, note 6); the statute of limitations ran from the date the covenant was broken (Jenkins v. Hopkins, 9 Pick. (Mass.) 542); the pleadings of defendant in error are insufficient in not alleging positive facts (Hazard Co. v. Volker, 3 Wyo. 189); the Court should give effect to all parts of the instrument (Balch v. Arnold, 9 Wyo. 27); it should be enforced as made by the parties (Phillips v. Hamilton, 17 Wyo. 41).

Kinkead & Henderson, for defendant in error.

Defendant in error bases his claim upon ownership of the land; want of performance of conditions precedent cannot be urged for the first time on appeal; it was unnecessary to ask for a reformation of the instrument; the contention as to the statute of limitations is without merit, as it was not pleaded below (Hart v. Walton, 99 Pac. 719); only claims arising on contract must be presented to an administrator before suit (5618 C. S.); the rule does not apply to actions for the enforcement of liens (5624 C. S.); the evidence established a delivery of the deed (Walter v. Kressman, 25 Wyo. 293; 169 Pac. 313; 3623 C. S.); parol evidence is admissible to show the intention of the parties (Pring v. Swarm, 151 N. W. 734; Balch v. Arnold, *supra;* Albany v. Usel, 157 Pac. 204; Patch v. White, 117 U. S. 210); the deed was an executed contract (Collier v. Carter, 91 S. E. 551; Phillips v. Phillips, 186 Ala. 545; Hunt v. Hunt, 119 Ky. 39, 68 L. R. A. 180; Ferris v. Neville, 127 Mich. 444, 54 L. R. A. 464); a deed to take effect on the death of the maker where there are no other indicia to prove the intention of the grantor, may be construed as a deed or a will to prevent its becoming inoperative; the apparent intention of the parties must govern; even had the instrument provided that it should not be operative until the death of the grantor, that would not have determined the testamentary character of the instrument (Iness v. Potter, 153 N. W. 604; Pyle v. East, 155 N. W. 283); a deed becomes operative in *praesenti* even though enjoyment of the estate is postponed until the death of the grantor (Thomas v.

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Williams, 105 Minn. 88, 117 N. W. 155); a voluntary conveyance is good against the grantor's heirs, unless obtained by fraud or coercion (13 Cyc. 530); any valuable consideration will support a conveyance of land (13 Cyc. 533); the fact that the instrument was found among the effects of the grantor's, is of no importance on the question of delivery (Walter v. Kressman *supra*); the deed was signed and sealed by grantor and recorded by plaintiff and no other ceremony was required to make it effective (3623 C. S.); the case is on all fours with Meyer v. Stortenbecker, 165 N. W. 456); the right of a decedent to dispose of property as he may desire cannot be questioned (Cook v. Cook, 165 N. W. 402); the statute of limitations cannot be raised under a general denial (Bank v. Bank, 11 Wyo. 32; Marks v. Board, 11 Wyo. 482; Fidelity Co. v. Parker, 20 Wyo. 29); the statute of limitations would not run until grantor claimed an interest adverse to grantee (Cook v. Elmore, 25 Wyo. 393).

BURGESS, DISTRICT JUDGE.

This is a case brought here by Clyde M. Watts, Administrator of the estate of Mary A. Edwards, with the will annexed, defendant below, by proceedings in error to review a judgment rendered by the District Court of Laramie County adjudging the defendant in error, Charles P. Lawrence, plaintiff below, to be the owner of a special fund held by the Stock Growers' National Bank as stakeholder and to which the plaintiff in error had asserted a claim.

On March 29, 1905, Mary A. Edwards, a widow, signed, executed, and delivered to her son, Charles P. Lawrence, defendant in error herein, a warranty deed describing the following lands situated in a then portion of Laramie County, Wyoming, to-wit: The east one-half of the northwest quarter, the southwest one-quarter of the northeast one-quarter, and the northwest one-quarter of the northwest one-quarter of section twenty-six in township fourteen north of range seventy west. Through error, the description included the northwest quarter of the northwest

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quarter of said section twenty-six, which the grantor did not then and never did own, and omitted the northwest quarter of the northeast quarter of said section twenty-six, which was owned at the time by the grantor, and which, by the intention of the parties, was to be embraced therein. Sometime later the east half of the northwest quarter and the west half of the northeast quarter of said section twenty-six were taken by the City of Cheyenne in condemnation proceedings for water works purposes, and the compensation finally allowed for the taking of these lands amounted to $4,200.00, which sum is the subject matter of this controversy.

In April, 1915, Mary A. Edwards died, leaving a will, which was admitted to probate, and one Albert Chapman appointed executor. Chapman having resigned, Clyde M. Watts was appointed, and has been, since January, 1917, the administrator of the estate of Mary A. Edwards with the will annexed.

Both Charles P. Lawrence and the executor of the will of Mary A. Edwards having demanded the condemnation money from the City of Cheyenne, it was finally, by stipulation of the parties, placed in the hands of the Stock Growers' National Bank of Cheyenne to be held by it pending the litigation and turned over to the party to whom the ownership thereof was decreed, and the bank was made a party to the action.

The main contention upon which a reversal of the case is sought by the plaintiff in error is that the deed or instrument above mentioned was invalid in that it was never delivered, and that it was testamentary in character and, not being executed with the formalities of a will, was ineffectual either as a deed or a will.

The basis of the contention that there was no delivery of the instrument is the fact that it was found upon the death of the grantor among some of her effects. The evidence in the case, however, shows that upon the signing of the instrument by the grantor she acknowledged to T. J. Fisher, Clerk of the District Court of Laramie County, Wyoming, "that she signed, sealed and delivered" the same "as her free and

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voluntary act for the uses and purposes therein set forth"; that the grantee then took the deed and had it recorded in the proper office and upon its being recorded it was returned to him; that she subsequently stated to others that she had deeded her land to her son, the grantee. In view of this evidence, we do not feel justified in disturbing the finding of the lower court that there was a delivery of the deed.

Was the deed or instrument testamentary in character? In form it was a warranty deed. The consideration therein recited is "One Dollar and other valuable considerations". The granting clause is that the grantor "has granted, bargained, sold and conveyed, and by these presents does grant, bargain, sell and convey, unto said party of the second part and his heirs and assigns forever" the land first above described. There is a release by her of her homestead right in the premises. The covenants on her part are that "she is well seized in the premises in and of a good and indefeasible estate in fee simple", and that "they are free from all encumbrances whatsoever except a certain lease given to one William F. Ferguson", that "she has good and lawful right to sell and convey the same" and that "she will and her heirs, executors and administrators shall warrant and defend the same against all lawful claims and demands whatsoever", "that the said party of the second part shall and may lawfully at all times hereafter peaceably and quietly have, occupy, possess and enjoy the said premises hereby granted or intended so to be, with the appurtenances, without the lawful hindrance or molestation of the party of the first part, her heirs or assigns, or of any other person or persons whatsoever, by or with his or their consent, privity or procurement." There is also in the instrument, in typewriting, the following clause: "It is further understood and agreed by and between the parties hereto that the said C. P. Lawrence shall, within one year after the decease of the said Mary A. Edwards, pay to Edward Lawrence the sum of Fifty Dollars, to John Lawrence the sum of Twenty-five Dollars, to Robert Lawrence the sum of Three Hundred Dollars, to Thomas Lawrence, Grandson, the sum of Fifty

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Dollars, and to Mrs. Lizzie A. Hurbutt the sum of Ten Dollars, and upon filing receipts from the above named persons then this deed be of full force and effect, otherwise to be null and void." It is by virtue of this clause that the contention is made that the instrument is inoperative as a deed because testamentary in character.

The usual test applied to determine whether an instrument is a deed or a will is whether or not it passes a present interest or estate. If it creates or vests in the grantee a present estate, even though that estate be one which can not be enjoyed until the death of the grantor, it is a deed. "An estate is vested when there is an immediate right of present enjoyment or a present fixed right of future enjoyment" (Kent, Vol. 4, p. 202).

Whether such an instrument as we have in this case creates such an interest is a matter upon which there is some conflict among the cases, but from an examination of the whole instrument, giving effect so far as possible to all its provisions, we are convinced that it operated to vest in the grantee an interest or estate at the time of its execution. In so holding we are, we believe, but following the weight of authority. Says the Kentucky Court of Appeals, in the case of John Hunt v. F. M. Hunt, 119 Ky. 42, 82 S. W. 999 (68 L. R. A. 181, 7 Ann. Cases 788), in upholding as a deed an instrument which provided that it was not to take effect until the death of the grantors, "The rule followed rests on the ground that, as the instrument contains words of present grant, covenant of warranty, and the like, and is authenticated or acknowledged as a deed, some force must be given all the parts of the instrument, and such a construction must be given to it as will make the instrument effective, rather than one that would deny it any operation; and therefore the words that the instrument is not to take effect until the death of the grantor must be construed as a clumsy way of expressing that the deed is not to take effect in possession or in the enjoyment of the property until the grantor's death." The court further says on page 45 of 119 Ky; page 1000 of 82 S. W.; page 182 of 68 L. R. A. (7

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Ann. Cases 788): "The object of all construction is to arrive at the intention of the maker of the instrument. In doing this, all parts of the instrument must be considered, and in a deed, in case of doubt, it must be resolved against the grantor, for he selects his own language. While the instrument in question contains the words that it is not to take effect until the death of the grantors, it also contains the words, "do hereby sell and convey", "to have and to hold", and "said party of the first part hereby covenants with the said party of the second part that he will warrant the title hereby conveyed". These words aptly convey a present estate, and it is not presumed that one part of the deed was intended to conflict with another." See also Wilson v. Carrico, 140 Ind. 533, 40 N. E. 50, 49 Am. St. Rep. 213; Seals v. Pierce-Little Co., 83 Ga. 787, 10 S. E. 589; O'Day v. Meadows, 194 Mo. 588, 92 S. W. 637; Merck v. Merck, 83 South Carolina 329, 65 S. E. 347; Love & Blauw, 61 Kan. 496, 59 Pac. 1059; 48 L. R. A. 257.

It is further contended that the evidence in the case is insufficient to show any error in the description contained in the deed, or to justify any reformation of the same during the misdescription.

As bearing upon this matter, we believe the record sufficiently shows the following to be the facts:

For the purpose of furnishing the description of the land to be conveyed, there was handed to the scrivener who drew the deed a patent to Hugh J. Edwards from the United States for lands known as the Edwards Homestead and a lease supposedly covering the lands mentioned in the patent (though as to just what lands were embraced in the lease can not be gathered from the record); that the lands described in the patent were the east half of the northwest quarter and the west half of the northeast quarter of section twenty-six, township fourteen north of range seventy west; that these lands at the time of the signing of the deed were owned by Mary A. Edwards; that she did not at that time nor at any other time own the northwest quarter of the northwest quarter of section twenty-six; that it was the

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intention of the parties to the deed to convey the lands then owned by her and described in the patent; that she stated afterwards that she had sold to her son, C. P. Lawrence, the lands known as the Edwards Homestead, and that she no longer owned any ranch (Bill of Exceptions, pp. 7, 20, 21, 25).

Certainly it can not be presumed that the grantor intended to convey and the grantee intended to buy land to which the grantor had no title and never had any title, nor to which, so far as the record reveals, she ever expected to acquire any title. If there is any presumption at all it is that the grantor intended to convey and the grantee intended to buy lands which the grantor then owned and which she had the right to sell and convey.

No formal reformation of the deed was decreed by the lower court, but it expressly found that the parties intended that the east one-half of the northwest quarter and the west one-half of the northeast quarter of section twenty-six should be conveyed, and the rights of the parties were determined upon that basis. In this we see no error.

The plaintiff in error assails the amended and substituted petition of the defendant in error on the ground that it failed to state a cause of action, in that (a) The right of the defendant in error, if any, to the funds in question was in the nature of a claim against the estate and there is no allegation of presentation of said claim to the administrator; (b) That the action is barred by the statute of limitations; (c) That the deed contains a condition precedent, the performance of which by him was not pleaded.

The contention that the right of the defendant in error to the funds in question was in the nature of a claim against the estate which had to be presented for allowance to the executor before suit is without merit. Whoever was the owner of the land was the owner of the condemnation money, for this money merely represented the land and was the fund in dispute. The gist of the whole controversy is, therefore, who was the owner of the land at the time it was condemned? Mary A. Edwards, the grantor, at the time of

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her death, did not owe the defendant in error $4,200.00, or any sum whatever, nor did the executor, or his successor, the plaintiff in error, herein as administrator, owe the defendant in error $4,200.00, or any sum whatever. How then could he present a claim against the estate for any sum? The executor or administrator was never in possession of the money, neither of them ever had the funds in dispute. The relief asked for by the defendant in error and the judgment rendered is not that the estate or the personal representative of the decedent as such pay the defendant in error $4,200.00, or any sum of money, but that the defendant in error be decreed the owner of the fund in the hands of the bank free from the claims of the estate. (See Church New Probate Law and Practice, Vol. 1, p. 700, par. 3.)

The plaintiff in error did not raise the statute of limitations in the court below either by demurrer or answer, and he therefore waived it.

Whether the clause in the deed requiring the grantee to do certain things within a year after the death of the grantor was a condition precedent or not, it was not necessary for him to allege his performance thereof under the facts in this case in order to state a cause of action. The defendant in error alleges, in his amended and substituted petition, "that he is the absolute owner" of the money held by the Stock Growers' National Bank; that it was the money turned over to the bank by the City of Cheyenne in condemnation proceedings resulting in the taking of certain lands of which he was the owner and which he had purchased from Mary A. Edwards; and that the plaintiff in error was asserting a claim to the money in the hands of the bank.

The allegation that he was the owner of the money held by the bank was a sufficient allegation as to his title. He did not need to plead how he became the owner. It is true he alleges he was the owner of the lands condemned, and that he purchased these lands from Mary A. Edwards, but these were allegations of evidence which it was not necessary to plead. He was not required to plead a performance by him of the conditions precedent in a deed which con-

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stituted a link in his chain of title. Says the court in George Adams and Frederick Co. v. The South Omaha National Bank, 123 Fed. 641, 60 C. C. A. 579, "An averment that one is the owner of certain described property is an averment of an ultimate fact such as is permissible in good pleading. It is not usually deemed necessary, when making an allegation of this sort, to describe the manner in which the pleader became the owner of the property."

The defendant in error at the trial of the case introduced evidence tending to show a performance by him of some of the obligations imposed upon him by the deed in question, and facts which tended to excuse a performance by him of the other obligations, and the plaintiff in error challenges the sufficiency of the evidence to show a performance or a legal excuse for the performance by him of these obligations.

The court below made an express finding of fact "That the grantee in said deed is not chargeable with default in the performance of any duty or obligation imposed upon him." There is evidence in the record justifying this finding and it should not be disturbed.

Other questions are raised by the plaintiff in error in his brief which we have duly considered, but we deem their discussion unnecessary.

The judgment will be affirmed. *Affirmed.*

BEARD, C. J., and POTTER, J., concur.

BLYDENBURGH, J., being unable to sit in this case, HON. JAMES H. BURGESS, Judge of the Fourth Judicial District, was called in and sat in his stead.

ON PETITION FOR REHEARING.

BEARD, CHIEF JUSTICE.

This case was decided in an opinion handed down December 18, 1919, 185 Pac. 719. A petition for a rehearing has been filed by counsel for plaintiff in error. The grounds upon which a rehearing is sought are on practically every point decided in the case; and the brief in support of the petition consists almost entirely of a re-argument of those

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questions. On the hearing of the case we were favored with an elaborate brief in which all of the grounds presented by the petition for a rehearing, with one or two exceptions, were fully discussed, and the case was also argued at length orally; and was given full consideration by the court. We think the correct rule on applications for rehearing is well stated, and supported by the authorities, in 18 Enc. P. & P. 36, as follows: "Where all the facts presented have in fact been duly considered by the court, and where the application presents no new facts, but simply reiterates the arguments made on the hearing, and is in effect an appeal to the court to review its decision on points and authorities already determined, a rehearing will be refused" (Brown v. Brown, 64 Mich. 82; Hadley v. Challiss, 15 Kans. 602; Steele v. State, 33 Fla. 354; and other cases cited in note). However, a few points in the brief merit attention.

It is strenuously argued that the court was in error in its statement in the opinion that the statute of limitations not being raised in the court below, by demurrer or answer, was waived. And it is argued that by the former decisions of this court that when it appears on the face of the petition that the action is barred, the petition does not state facts sufficient to constitute a cause of action, and the question can, therefore, be raised at any time, even on appeal. The cases cited hold that when it does so appear upon the face of the petition, it does not state a cause of action and is subject to a general demurrer; but that is the extent to which those cases go, and do not decide that if the objection is not thus taken it is not waived. The point, however, was not necessary to a decision in the present case. The question in this case is, who owned the land at the time it was condemned by the city? Whoever owned it at that time is entitled to the condemnation money, and the fact that the defendant in error alleged in his petition that he was not only the owner at that time, but had been such owner for more than ten years prior thereto, and unnecessarily pleaded the source of his title, did not show that his action to determine his right to the money in the hands of the stakeholder was barred

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by the statute. If counsel's contention were true, then one who was the owner of the land condemned at the time of the condemnation, and had been the owner for more than ten years prior thereto, would be barred from asserting his right to the condemnation money because some one else wrongfully claimed to be the owner at the time of condemnation.

It is also argued that the court did not consider an alleged error of the trial court in denying the motion for a new trial on the ground of newly discovered evidence. That point was raised by the motion for a new trial, but was not argued in the original brief, and was therefore waived (Bank v. Ludvigsen, 8 Wyo. 230; Phillips v. Brill, 15 Wyo. 521, 90 Pac. 443).

Considerable space in the brief is devoted to the contention that the judgment against the city was not proven. It was not necessary to offer evidence to sustain an allegation of the petition which was to all intents and purposes admitted in the answer. The agreement by which the money was deposited in the bank was attached to the original petition and made part thereof, and was unmistakably referred to and made a part of the amended petition; and the defendant in his answer admitted "that said bank occupies the position of stakeholder as to the funds involved in this action which have been deposited with it by said plaintiff and said Albert Chapman as executor of said estate of Mary A. Edwards, deceased." And in the second paragraph of his answer he alleges: "That said Mary A. Edwards, deceased, was the owner of the lands described in plaintiff's amended and substituted petition; that said lands were taken by the city of Cheyenne in condemnation proceedings; that the sum of $4,200.00, which is the money in controversy in this action, and which was deposited with said Stock Growers' National Bank to be held until the ownership thereof should be settled and determined, is a part of the consideration for said land paid by the City of Cheyenne in said condemnation proceedings; that the judgment of court rendered in said condemnation proceedings was rendered during the lifetime

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of said Mary A. Edwards, deceased, and such judgment thereupon became and was her sole and separate property; that said defendant, as the administrator with the will annexed of the estate of said Mary A. Edwards, deceased, is, by law, authorized and entitled to receive and recover said sum of $4,200.00 as the property of said estate." We are unable to see what difference it makes whether the amount of the condemnation money was determined by agreement, by appraisers, or by the court on an appeal from the award of the appraisers. The amount paid by the city is not in dispute and it is alleged and admitted that it was deposited to await a decision as to its ownership. The point urged is without merit. All other questions material to a determination of the matters in controversy in the case are discussed and decided in the original opinion. No substantial reasons for a rehearing having been advanced, a rehearing is denied.

Rehearing denied.

POTTER and BLYDENBURGH, JJ., concur.

LOY v. STATE.

(No. 963; Decided December 30, 1919; 185 Pac. 796.)

CRIMINAL LAW—ERRORS NOT OBJECTED TO—JURY—CHALLENGE TO JURORS—DISQUALIFICATION OF JURORS—OVERRULING CHALLENGE TO JURORS—HOMICIDE—PREMEDITATED MURDER—INSTRUCTION IN HOMICIDE CASE—SELF DEFENSE—WITNESSES—CROSS EXAMINATION OF ACCUSED—ACCUSED CANNOT COMPLAIN OF EVIDENCE BROUGHT OUT BY HIS ATTORNEY.

1. It is only in extreme cases disclosing fundamental and prejudicial errors that prevented that fair and impartial trial of a defendant guaranteed to him by the Constitution, and amounting to a denial of justice, that an exception will be made to the statutory rule of law, requiring timely objections to be made and exceptions taken at the trial, to secure consideration of such alleged errors on appeal.
2. The question presented by a challenge to a juror, as having formed an opinion which would disqualify him under

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Comp. Stat. 1910, Section 6207, is one of mixed law and fact, and as far as the facts are concerned, is to be decided by the Court upon the evidence.

3. In finding that a juror was not disqualified as having formed an opinion, held, not manifestly erroneous under the evidence.
4. It was harmless error to overrule a challenge to a juror for cause, where the juror was challenged peremptorily, although accused had exhausted his peremptory challenges; there being nothing to indicate that the jury which tried the case was not an impartial jury, or that any objectionable person sat upon the jury.
5. The word "premeditated", when used in reference to first degree murder, implies an interval, however brief, between the formation of the intent or design and the commission of the act.
6. Part of an instruction; "it is the fixed, deliberate, premeditated intention to kill which characterizes murder in the first degree, and the premeditated malice mentioned in the information need only to be such deliberation and thought as enables a person to appreciate and understand at the time the act is committed the nature of the act and its probable results," held, not misleading as telling the jury that all that was necessary to constitute murder in the first degree was that the defendant appreciated and understood the nature of the act and its probable results, when considered with the entire instruction.
7. To justify killing in self-defense, defendant must not only have believed he was in danger, but the circumstances must have been such as to afford reasonable grounds for the belief.
8. In determining whether a particular instruction was misleading, the instructions must be considered as a whole.
9. In a prosecution where defendant was convicted of murder in the first degree, evidence held sufficient to sustain a finding that the killing was premeditated.
10. In a prosecution for murder in the first degree, whether defendant killed deceased in self defense, held, for the jury.
11. An accused may be cross-examined by the state on matters to which he testified in chief.
12. An accused cannot complain of the admission of evidence brought out on cross-examination of witnesses by his attorney.

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ERROR to District Court, Laramie County, HON. WILLIAM C. MENTZER, Judge.

Charles V. Loy was tried and convicted of murder in the first degree and brings error. The material facts are stated in the opinion.

Marion A. Kline, for plaintiff in error.

Defendant's rights were not properly protected at the trial; the jury was improperly instructed as to the law of self defense and of premeditated malice; the court erred in overruling the challenge to jurors; the evidence was insufficient to support a conviction of murder in the first degree; errors amounting to a denial of justice will be reviewed even where objections were not made (Ohama v. State, 24 Wyo. 513, 12 Cyc. 708); the court erred in admitting the dying declaration of deceased, which was a conclusion and not a statement of facts; the jury was not properly instructed on premeditated malice (Parker v. State, 24 Wyo. 500; Cirej v. State, 24 Wyo. 507; Ross v. State, 8 Wyo. 351); the instruction on self-defense was erroneous (State v. Yokum, 11 S. D. 544, 79 N. W. 835; McDonall v. People (Ill.) 48 N. E. 36); the giving of erroneous instructions was not cured by giving correct ones (State v. Rolla, 55 Pac. 525; State v. Pell, 59 Pac. 174; State v. Singleton, 74 Pac. 243; Palmer v. State, 9 Wyo. 40, 59 Pac. 796); the court erred in overruling the challenge to jurors for cause (6207 C. S.; Sullins v. State, 79 Ark. 127); the ruling was prejudicial since defendant had exhausted all peremptory challenges before the jury was complete (State v. Beatty, 45 Kan. 492; 25 Pac. 899; State v. Crofford, 96 N. W. 899); the evidence was insufficient to sustain first degree murder (Parker v. State, *supra*).

W. L. Walls, Attorney General, and *T. Paul Wilcox, Deputy Attorney General,* for defendant in error.

Lack of preparation or alleged incompetency of defendant's counsel is not grounds for a new trial except in cases of actual prejudice (12 Cyc. 708; Darby v. State, 79

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Ga. 63; State v. Currans, 46 Kans. 750; Hudson v. State, 76 Ga. 727; State v. Dreher, 137 Mo. 11; State v. Benge, 61 Iowa 648); the instructions on premeditation are supported by authority (Parker v. State, 24 Wyo. 491); instructions are to be considered together (16 C. J. 1049); the instruction on the question of self defense fairly stated the subject (Parker v. State, 24 Wyo. 491); the overruling of challenges to jurors was not erroneous (Bryant v. State, 7 Wyo. 311; Carter v. Ter., 3 Wyo. 193); the verdict is fairly supported by the evidence.

BEARD, CHIEF JUSTICE.

The plaintiff in error, Charles V. Loy, was convicted in the District Court of Laramie County of the crime of murder in the first degree for the killing of one William Ashford, and sentenced to imprisonment in the penitentiary for life. He brings the case to this court by proceedings in error.

The motion for a new trial, which was denied, assigns the following alleged errors, viz: "(1) Because the verdict of the jury and the judgment entered thereon are contrary to law. (2) Because the verdict of the jury and the judgment entered thereon are contrary to the evidence. (3) Because there is no evidence to show that the defendant premeditated the killing of the deceased and as premeditation is one of the material allegations of a charge of murder in the first degree, there can be no legal conviction on such charge unless evidence is introduced establishing the fact of premeditation. (4) Because the court erred in overruling the challenge for cause made by the defendant to the juror Louis Veta, and compelled the defendant to exercise one of its peremptory challenges on said juror, said juror having shown on his *voir dire* that he was biased and prejudiced against this defendant. (5) Because the court erred in overruling the challenge of the defendant for cause to the juror H. C. Klein, said juror having shown on his *voir dire* that he was biased and prejudiced against the defendant." The petition in error contains the same as-

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signments of error and also the overruling of the motion for a new trial.

In addition to the alleged errors assigned in the motion for a new trial, counsel who represents the plaintiff in error in this court, but who did not represent him on the trial, has earnestly urged in his brief and oral argument, that although no objections to any of the instructions given by the court to the jury, or to the admission of certain testimony, or took exceptions thereto on the trial, nevertheless, an examination of the whole record will disclose such fundamental and prejudicial error, as will show that defendant below was deprived of a fair and impartial trial, and for that reason he should be granted a new trial. This court has in a few cases of murder in the first degree in which the jury did not add to its verdict "without capital punishment", and the death penalty was imposed, considered the entire record, although it did not disclose objections and exceptions, and from such examination arrived at the conclusion that it disclosed such fundamental and prejudicial errors as had deprived the defendant of that fair and impartial trial guaranteed to him by the constitution, and amounted to a denial of justice; and, so concluding, awarded a new trial (Parker v. State, 24 Wyo. 491, 161 Pac. 552; Ohama v. State, 24 Wyo. 513, 161 Pac. 558; Cirej v. State, 24 Wyo. 507, 161 Pac. 556). It is only in such extreme cases that the statutory rule of law that to secure a consideration in this court of alleged errors occurring upon the trial, timely objections must be made and exceptions taken.

In the present case exceptions were duly taken to the overruling of the challenges to the jurors Veta and Klein. It is sufficient to say that there is nothing disclosed in the testimony of the juror Veta on his *voir dire* which would disqualify him as a juror under the statute, and there was no error in overruling the challenge to him. The juror Klein testified on his *voir dire* that he knew the deceased but not personally. That he had read accounts of the homicide in the newspapers and had talked about it with others in whom he had confidence, and from what he had read and

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from what had been told him he had formed and expressed an opinion as to the guilt or innocence of the defendant. That he had heard others express an opinion as to the guilt or innocence of defendant. It is difficult to determine the state of mind of this man from his answers. When asked if he could enter upon the trial with his mind free from the impressions he had and let his mind be made up solely from the evidence, he answered, "I don't know whether I could or not." And when asked if he could lay aside any impression he had, he answered, "I don't believe I could;" but in answer to a question by the court he said he could try the case fairly and impartially. And again he stated that he would give the defendant the benefit of the presumption of innocence until it was overcome by competent evidence. Being further questioned by counsel for defendant, he was asked: "Q. Is it not a fact, Mr. Klein, that you have at this time a certain amount of prejudice, bias and feeling in this case? A. Well, as I have said before, I have expressed myself about the case and talked about it. Q. And you still have the same opinion you have had all the time? A. I have from the present evidence, yes. Q. Have you talked with persons who assumed to know something about the case? A. As to that I couldn't say. I was out of town at the time it happened. Q. But the persons who talked to you expressed an opinion themselves and told you certain things? A. Yes sir. Q. And they assumed to know some of the things they told you? A. I don't know whether they did or not; they thought they did. Q. And they were men upon whom you placed reliance and you believed them to be responsible people? A. Yes. Q. And you had confidence in what they said? A. Yes." Question by the court: "Q. Regardless of what has been told you by these people, and regardless of what you may have read, could you still lay any opinion you have aside and render a fair and impartial verdict on the evidence as introduced here on the stand and the instructions of the court? A. I think so." By counsel for defendant: "Q. And you formed an opinion because of rumor; you don't know

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whether those facts were true or not? A. No, sir. Q. It was simply rumor? A. That is all. Q. And even having heard this, you swear on oath here that you could render a fair and impartial verdict on the evidence you hear here and on nothing else? A. Yes, sir."

The question presented by the challenge is one of mixed law and fact, and, as far as the facts are concerned, is to be decided by the court upon the evidence. Chief Justice Waite, speaking for the court, in Reynolds v. U. S., 98 U. S. 145, in considering the question, said: "It is clear, therefore, that, upon the trial of the issue of fact raised by a challenge for such cause, the court will practically be called upon to determine whether the nature and strength of the opinion formed are such as in law would necessarily raise the presumption of partiality. The question thus presented is one of mixed law and fact, and to be tried, as far as the facts are concerned, like any other issue of that character, upon the evidence. The finding of the trial court upon that issue ought not to be set aside by a reviewing court unless the error is manifest. No less stringent rules should be applied by the reviewing court in such case than those which govern in the consideration of motions for new trial because the verdict is against the evidence. It must be made to clearly appear that upon the evidence the court ought to have found the juror had formed such an opinion that he could not in law be deemed impartial. The case must be one in which it is manifest the law left nothing to the conscience or discretion of the court." The court, in Carter v. Territory, 3 Wyo. 193, 18 Pac. 750, 19 Pac. 443, quoted at length from the opinion in that case, and approved and followed the rule therein stated. Approved and followed in Bryant v. State, 7 Wyo. 311, 51 Pac. 879, 56 Pac. 596.

The statute, Sec. 6207, Comp. Stat. 1910, provides:

"In the trial of criminal cases it shall not be cause for challenge that a person called to act as a juror has formed or expressed an opinion as to the guilt or innocence of the accused from newspaper reports and rumor, or from either of them, if such person swear that he can impartially try

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the case according to the law and evidence, notwithstanding such opinion." We regard the question of the qualification of this man to act as a juror in the case a very close one; but the trial court found him qualified on the evidence before it, and we are not prepared to hold that the finding was not supported by sufficient evidence, or that the ruling was manifestly erroneous. But even if it was error to overrule the challenge, it is not made to appear that it was prejudicial to the defendant. Both of the men challenged were challenged peremptorily by the defendant and did not sit as jurors on the trial. It is true the defendant had to use peremptory challenges as to them, and that he exhausted his peremptory challenges; but there is nothing in the record indicating, nor has it been claimed, either in the brief or in oral argument, that the jury which tried the case was not an impartial jury, or that any objectionable person sat upon the jury. Defendant was entitled to a fair and impartial jury, but to nothing more. And in so far as it has been made to appear here he had such a jury; and was not, therefore, prejudiced by the overruling of the challenge interposed to Mr. Klein for cause.

Two instructions given by the court to the jury are here complained of, but neither of them was objected to on the trial. The jury was instructed, "The word 'premeditated' as used in the information and in the statute means to think beforehand. It implies an interval, however brief, between the formation of the intent or design and the commission of the act. To find the defendant guilty of murder in the first degree, you must find from the evidence beyond a reasonable doubt that he killed the deceased purposely and with premeditated malice as herein defined; but it is not necessary that such premeditation should have existed in the mind of the defendant for any particular length of time before the killing; it is sufficient if he has deliberately formed in his mind a determination to kill and has thought over it before the shot was fired—if you find that he did fire the fatal shot, and fired the shot in pursuance of such deliberate purpose and design. It is the fixed, deliberate,

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premeditated intention to kill which characterizes the crime of murder in the first degree, and the premeditated malice mentioned in the information need only be such deliberation and thought as enables a person to appreciate and understand at the time the act is committed the nature of the act and its probable results."

It is the last clause of the instruction which is claimed to be erroneous and in conflict with the former part thereof; and it is argued that the jury must have understood from this that all that was necessary to constitute murder in the first degree was that the defendant at the time he fired the shot appreciated and understood the nature of the act and its probable results. We do not agree with that contention. The court was there speaking of the kind and character of the deliberation, and not of the length of time it had existed in the mind of the defendant. The word "premeditated" had already been clearly and correctly defined, and the jury was told that to find defendant guilty of murder in the first degree, it must find from the evidence beyond a reasonable doubt that he killed the deceased purposely and with premeditated malice "as herein defined". Considering the entire instruction, we think it not only improbable, but also impossible for the jury to have been misled. Counsel for defendant rely upon the cases in 24 Wyo., above cited. But in those cases the instructions were materially different from the one here. In those cases the definition of premeditated malice was radically erroneous.

On self-defense the court instructed the jury as follows: "The court instructs the jury that the right to defend one's self against danger, not of his own seeking, is a right which the law not only concedes but guarantees to all men. The defendant may, therefore, have killed deceased and still be innocent of any offense against the law. If, at the time he shot deceased, he had reasonable cause to apprehend on the part of deceased, a design to do him serious personal injury, and there was reasonable cause for him to apprehend immediate danger of such design being accomplished, and to avert such apprehended danger, he shot, and at the time he

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did so, he had reasonable cause to believe, and did believe, it necessary for him to shoot in the way he did to protect himself from such apprehended danger, then, and in that case, the killing was not feloneous, but was justifiable, and you ought to acquit him upon the ground of necessary self-defense. It is not necessary to this defense that the danger should have been actually real, or that the danger should have been impending and immediately about to fall. All that is necessary is that defendant had reasonable cause to believe, and did believe, these facts. But before you acquit on the ground of self-defense, you ought to believe that defendant's cause of apprehension was reasonable. Whether the facts constituting such reasonable cause have been established by the evidence, you are to determine, and unless the facts constituting such reasonable cause have been established by the evidence in the case, you cannot acquit in such case on the ground of self-defense, even though you may believe that defendant really thought he was in danger." The only objection urged against this instruction is to the language, "you cannot acquit in such case on the ground of self-defense, even though you may believe that defendant really thought he was in danger." Counsel states his contention in his brief as follows: "If the danger appeared real to the defendant and he acted in the honest belief that he was in danger, then he was entitled to an acquittal on the ground of self-defense." Counsel overlooks the important fact that the belief must be based upon reasonable grounds. Defendant must not only believe he is in danger, but the circumstances must be such as to afford reasonable grounds for the belief.

In Parker v. State, *supra,* it is said: "The assault must be of such character as to create in the mind of the defendant a reasonable belief that the danger is imminent," etc. See also 25 A. & E. Enc. L. (2nd Ed.) 262, and cases there cited. The court also correctly instructed the jury, "that to entitle a defendant charged with murder to an acquittal on the ground of self-defense, he need not establish his defense by a preponderance of evidence. It is sufficient if

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the evidence is such as to create in the minds of the jury a reasonable doubt of his guilt." Considering the instructions as a whole, as they must be considered by the jury and this court, we do not discover anything therein prejudicial or erroneous, or calculated to mislead the jury.

It is urged that there is no evidence of premeditation. That requires a reference to the testimony. The deceased was a colored man, a porter at the Albany Hotel in Cheyenne. On the day of the homicide he came on duty at about seven o'clock in the evening and found the defendant in the lobby of the hotel with his hand baggage, and stated that he was going to take the 11:15 p. m. train for Casper. Deceased informed him that he could not get on the sleeper until 10 o'clock, to which he replied: "I don't want a nigger to tell me anything." Sometime later defendant was in the cafe adjoining the lobby talking to one Christy, the cook, and asked for his coat, which he claimed to have left in a rack in the lobby. Christy found the coat in the cloak-room, and he or deceased took the coat to defendant in the lobby, when deceased told him that he (deceased) had put it in the cloak-room, whereupon defendant accused him of trying to steal it. Defendant states that deceased then said to him, "I don't want your coat, and for that, you s— of a b—, I'll knock you on your ass." I said, "I don't think you will," and he said, "Follow me and I'll show you." The deceased then went into the saloon adjoining the lobby or cafe. There is some difference between the testimony of defendant and Christy as to the language used, but the substance is the same, and we have given defendant's version of it. In a short time thereafter, probably eight or ten minutes, deceased returned to the lobby and took his seat in the rear of the lobby. Defendant went to the desk and he says he was angry and was telling the clerk how nicely he had been treated up to that time. The clerk rung a bell calling deceased to the desk. When he came within a few feet of defendant, defendant testified that deceased said: "I'll get you this time." "I stepped back a step or two and said: 'Don't come up here', and he kept on coming, and put his

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right hand in his hip pocket, and before he could get his hand out I shot him. When he put his hand in his pocket I said, 'men have been shot for less than that'." The policeman who arrested defendant in the hotel lobby in a few minutes after the shooting testified that he asked him why he shot deceased. "He told me he had given him some of his guff and he wasn't in the habit of taking that off a nigger." The testimony of the clerk tends to corroborate the defendant in that he said to deceased, "don't come up here", and that deceased put his hand back toward his hip pocket and that some words passed between them which he did not understand; but he admitted that he said nothing about deceased putting his hand toward his pocket when testifying before the coroner's jury; said nothing about that to the deputy sheriff who interviewed him soon after the shooting; and admitted that he stated to the deputy when asked why, in his estimation, Loy had fired the shot, he said he was at a loss to explain that, he didn't know. "I am from the south; I don't like a nigger, but I hate to see any human being shot down as this man was without any cause." It appears the deceased was not armed. Two men who were in the cafe at the time the shot was fired went into the lobby immediately, and they testified that on entering defendant had his hand on the hotel register with the pistol in his hand; that he turned and came toward them with the pistol still in his hand and said, "You are white men, you are all right," or "You are white men and are in no danger." That he then walked around deceased, who was lying on the floor, and said, "I'll teach a nigger to tell me he will set me on my ass." He then said to deceased, in substance, you are not hurt. I know where I shot you. I never miss a shot. I just eased one into you gently. The dying statement of deceased was introduced in evidence in which he stated that when the clerk called him and he approached the counter where defendant was standing, defendant "was still beefing about being as good a man as I was. He said he had killed a better nigger than I was. Then and there pulled his revolver and shot me. * * * Before he shot

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me I had not made any threats toward him or endeavored in any way to harm him." His statement as to what occurred about the overcoat, while in different language, does not very materially differ from that above set out. It will thus be seen that as to what was said and done by defendant and deceased there is a conflict in the evidence. Whether the shooting was premeditated on account of what had previously occurred between the parties, or was the result of an assault by the deceased immediately before the shot was fired was a question for the jury. The several statements of the defendant almost immediately after the shooting all tend to show that it was the former. In none of these statements did he claim he had been assaulted at the time and that he shot in self-defense. His first statement after the shot was fired that "he would teach a nigger" etc., could have referred only to the language he testified deceased used toward him at the time he accused deceased of trying to steal his coat. In our opinion there was sufficient evidence to warrant the jury in finding as it did.

It is further contended that immaterial evidence prejudicial to defendant was admitted. Ordinarily it would be sufficient to say that it was admitted without objection. But a careful examination of the record discloses that the evidence now claimed to have been erroneously admitted was in most part brought out on cross-examination of defendant on matters to which he testified in chief, or on cross-examination of other witnesses by defendant's attorney.

Counsel for plaintiff in error contends that the attorneys for defendant who conducted his defense were inexperienced, unfamiliar with the practice in this state, and negligent in not making objections and preserving exceptions, and in going to trial without due preparation. But the record does not sustain that contention. The case appears to have been fairly and fully presented to the jury, and it is not shown that defendant was deprived of any defense which he had.

The judgment of the District Court is affirmed.

POTTER, J., and BLYDENBURGH, J., concur. *Affirmed.*

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STOCK GROWER'S STATE BANK v. MILLARD.

(No. 968; Decided December 30, 1919; 186 Pac. 121.)

ATTACHMENT—GROUNDS FOR ATTACHMENT BEFORE DEBT DUE—SUFFICIENCY OF EVIDENCE OF INTENT TO DEFRAUD CREDITORS—DISPOSAL OF PROPERTY FOR PAYMENT OF DEBTS—BULK SALES LAW—OMISSION OF DEBTS FROM LIST OF CREDITORS—EVIDENCE OF INTENT TO CHANGE LEGAL RESIDENCE—GARNISHMENT—INSOLVENCY NOT GROUNDS FOR ATTACHMENT BEFORE DEBT DUE.

1. In attachment proceedings before debt due, the gist of the matter is the intent of the debtor to defraud his creditors and it must be shown that certain things were done by the defendant, that are given in the statute (Comp. Stat. 1910, Secs. 4890-96) as grounds for attachment, and done to hinder, delay and defraud his creditors. The burden of proving this intent to defraud is upon the plaintiff.
2. In attachment proceedings before debt due, upon the grounds that defendant had sold, or was about to sell, his drug business with intent to defraud his creditors, evidence held to show that defendant sold his business with an honest intent to pay his creditors.
3. Where it is shown that defendant has disposed of most of his property for the purpose of paying his debts and used the proceeds for that purpose, held, not to show a fraudulent intent and not grounds for attachment.
4. In the absence of knowledge or connivance by the purchaser, the omission of a creditor from the list furnished by the seller in an attempt to comply with the Bulk Sales Law (Laws 1911, Chap. 33 as amended by Laws 1913, Chap. 14) was not grounds for attachment before debt due under Comp. Stat. 1910, Secs. 4890-96.
5. In proceedings for attachment before debt due, evidence of statements of defendant that he intended to go into the National Army, and that he intended to get a job in another state, was insufficient to show intent to change his legal residence, or a fraudulent intent on the part of the defendant, or sufficient grounds for attachment.
6. In view of Comp. Stat. 1910, Secs. 4864, 4876, the maker of a note should not be charged as garnishee of payee under attachment served before maturity, unless it be affirmatively shown that before rendition of judgment, the note had become due and was still the property of the payee.
7. The fact that defendant had disposed of his property and was insolvent, would not in itself, be grounds for attach-

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ment before debt due, it not being shown that he had disposed of a note taken on sale of his property, which was not due for three years. If he was still the owner of the note so that a garnishment would lie at all as to it from the evidence, he was far from insolvent, and had a substantial balance over all his debts and liabilities.

APPEAL from District Court, Washakie County; HON. P. W. METZ, Judge.

Action by the Stock Grower's State Bank against L. A. Millard from an order discharging attachment and plaintiff appeals. The material facts are stated in the opinion.

C. H. Harkins and *H. C. Brome,* for appellant.

It was clearly shown that defendant intended to leave town; it was also shown by the admissions of defendant himself that he had not complied with the requirements of the bulk sales law by furnishing a complete list of his creditors; it was also shown by his own admissions that he was insolvent; the disappearance of several thousand dollars from defendant's assets without reason or explanation, the transfer of his book accounts to his wife, and his refusal to give any information touching the amount due or collected, compels the conclusion that he had disposed of his property with the intent to defraud his creditors; it was shown by his admissions that he was about to become a non-resident of the state, with the same intent (International Silver Co. v. Hull, 45 L. R. A. N. S. 493).

E. E. Enterline and *H. W. Rich,* for respondent.

The appeal should be dismissed; appellant failed to prepare the record on appeal within 70 days after the making of the order discharging the attachment; the record does not show the specifications of error to have been filed within 10 days after the filing of the record on appeal (Hahn v. Bank, 171 Pac. 889; 172 Pac. 715; Goodrich v. Bank, 174 Pac. 191, 177 Pac. 134; Laws 1917, Chap. 32, Sec. 8); it was shown by the evidence that respondent used the proceeds from the sale of his drugstore to pay his creditors; there was no showing that he used said proceeds for any

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other purpose; it was further shown that he offered to raise and pay $3,200.00 on his note given appellant before its maturity, and further offered to secure the balance of the note by depositing collateral; there was no grounds for attachment; appellee had a right to prefer a creditor if he so desired (Bank v. Ranch Co., 5 Wyo. 50); no fraudulent intent could be imputed to respondent in the disposition of his property; the order discharging attachment should be affirmed.

BLYDENBURGH, JUSTICE.

This case was brought to secure an attachment "before debt due" under the provisions of Chapter 311 (Sections 4890-4896), Wyoming Compiled Statutes 1910. A motion was made to discharge the attachment, a traverse to the affidavit for attachment filed by the defendant, and a hearing was had before the court below on the issue thus made. The court ordered the attachment discharged, and the plaintiff excepted to this order of the court. The case is brought here on direct appeal, the specifications of error alleging error only in making this order.

The grounds alleged for the attachment, as contained in the affidavit, are as follows:

"That said L. A. Millard has sold, conveyed, or otherwise disposed of, his property with the fraudulent intent to cheat and defraud his creditors, and to hinder and delay them in the collection of their debts."

"That said L. A. Millard is about to sell, convey, or dispose of, his property with the fraudulent intent to cheat and defraud his creditors, and to hinder and delay them in the collection of their debts."

"That the said L. A. Millard is about to become a nonresident of the State of Wyoming with the intent to defraud his creditors."

The affidavit of defendant in support of his motion to discharge the attachment is a specific denial of each of the grounds set up in the affidavit for attachment denying them in the same language. The plaintiff caused garnishee notices

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to be served under the attachment on both itself and upon Wyoming Sugar Company, a corporation, and no attempt was made to serve the attachment in any other way or to attach any tangible property. The answer filed by the plaintiff bank as garnishee was "That said Stockgrower's State Bank of Worland, Wyoming, has on deposit to the credit of said L. A. Millard, defendant, the sum of Sixteen Hundred Dollars", and the answer of Wyoming Sugar Company was to the effect that it owed a promissory note made payable to L. A. Millard in the sum of $5,000, said note being dated March 1, 1918, and due March 1, 1923, bearing interest at the rate of 6% per annum, which note was secured by a mortgage signed Wyoming Sugar Company on certain mentioned real estate, interest payable annually.

At the beginning of the hearing, after defendant had moved to dismiss the garnishment of the money in the plaintiff's hands, the plaintiff confessed this part of the motion and released the garnishment of the Stockgrowers' State Bank of Worland, the plaintiff. So the hearing proceeded with the only matter held under the attachment such as was evidenced by the answer of the Wyoming Sugar Company.

The facts, as shown by the record, are that the defendant was in 1918 engaged in the drug business at Worland; that he had borrowed from the plaintiff bank money evidenced at the time the suit was brought by two promissory notes, one for $3,500 and one for $1,500, each dated June 12, 1918, and each due 180 days after date with interest at the rate of 8 per cent. per annum, and these notes not yet due were the basis of this suit commenced Sept. 12, 1918. That on Aug. 2, 1918, the defendant entered into a contract for the sale of his entire stock and the fixtures of his drug business to George D. Cureton by the terms of which Cureton was to pay the defendant cash upon the completion of an inventory and $1,000 was to be deposited in the plaintiff bank at the execution of the contract to apply on the purchase price to be held by the bank in escrow with a copy of the agreement and to be paid to the defendant as liqui-

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dated damages in case Cureton failed to comply with his part of the agreement. There was to be allowed Cureton $700 discount from the invoice price, Cureton was to take possession within 30 days from the date of the agreement of sale and the property was to be invoiced on or about 25 days from the date of the agreement, the defendant in the meantime to remain in possession and conduct the business. The defendant agreed to "comply with the bulk sales law or furnish satisfactory bond to protect Cureton against outstanding bills at the option of defendant." That the plaintiff bank knew of the proposed sale and a cashier's check of the plaintiff bank was deposited in escrow with the plaintiff with a signed copy of the agreement as provided in said agreement. The invoice was not completed until about the 9th of September, Cureton in the meantime having made an arrangement to go into partnership with R. C. Schultz in the drug business and had gone east, leaving Schultz to take charge of the invoice and complete the deal. The amount the invoice showed should be paid the defendant Millard was $9,602.75, and there was left with B. J. Keys, the cashier of the First National Bank of Worland, a check of Schultz on said First National Bank for $5,102.75, and a check of Cureton on the Citizens' National Bank of Cheyenne for $3,500, which, with the $1,000 deposited with the plaintiff bank in escrow, made the $9,602.75, the amount to be paid the defendant for his stock of drugs. On the 9th of September the defendant Millard went to Keys at the First National Bank and presented what purported to be a list of his creditors and asked that the checks be turned over to him. Keys refused, as he claimed his instructions from Schultz were that Millard was to deposit a bond as well as a list of creditors. This list at that time was not sworn to. Millard went to see Schultz, who was at a garage getting ready to go out of town, and Schultz told him that if he would swear to the list he would direct Keys to turn over the checks, which he did over the telephone. Keys, who was a notary public, wrote under the list furnished by

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Millard, "I hereby certify that above is a list of all my creditors. .....

Subscribed and sworn to before me this 9th of Sept., 1918. B. J. KEYS,
Notary Public."

And the next morning when Millard came into the bank he had him sign it and then delivered to him the two checks of Schultz and Cureton, which checks the defendant immediately deposited to his checking account in the plaintiff bank, together with the $1,000 cashier's check that was in escrow, and as he at that time had an overdraft of $49.61 he had a credit to his checking account of $9,553.14. The defendant at once drew checks against this balance to pay his creditors, and among others one for $3,732.50 to pay $3,500 and interest due the First National Bank of Worland on a past due note, which indebtedness to the First National Bank and the notes in suit in this case given to the plaintiff bank were not given in the list of creditors, and there was also omitted therefrom several small amounts to other creditors, the statements or memoranda of which the defendant testified had become mislaid. The defendant was sworn as a witness and examined by and on behalf of the plaintiff and explained this by testifying that he thought he only had to give a list of his wholesale creditors,—those who had supplied goods for the store, and that Schultz told him all he wanted was a list of his wholesale creditors, and that he had told him that the list he had furnished was such a list, as near as he could remember, and as a fact he had no intention of omitting any such creditors. Upon the check for $3,732.50 to the First National Bank coming in to the plaintiff bank, its vice president and manager sought to collect the undue notes on which this suit is based, first charging defendant's checking account with the amount thereof without defendant's knowledge or consent and crediting the amount back when he became convinced he had no right to do that and then by demand upon defendant for payment. Defendant explained that he would not have cash enough to pay all his creditors the amount due them if he

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paid these undue notes in full, but offered to pay $3,200 in cash and give a note for $2,000 secured by a life insurance policy and to pay $25 per month on the new note, which offer was rejected by the plaintiff bank. Cureton, who was in the east, was advised by wire that he had better stop payment on the $3,500 check on the Citizens' National Bank of Cheyenne, which check had been sent on for payment by the plaintiff bank, and did so, but with his partner Schultz went into possession of the drug store. The plaintiff bank brought this suit and garnisheed the money remaining in the checking account of defendant and refused payment of all the checks issued to his creditors by the defendant that were presented thereafter, the balance to defendant's credit with said plaintiff bank at that time and at the time of the hearing, the $3,500 check having been charged back after payment was stopped, being $1,606.10. Cureton, after his return on Sept. 14th, began paying the creditors of the defendant whose checks issued by the defendant had been refused payment by the plaintiff bank out of the money represented by the $3,500 check that he had stopped payment on, and at the time of the hearing had left in his hands a balance of this $3,500 of $262.57. This was done without the consent or any notice to the defendant. It appeared from the testimony of the defendant that after the invoice of the stock both he and his wife had collected such accounts as were owing to him by customers of the drug business, most at least being small in amounts, and such amounts as his wife collected were deposited in her own name in the First National Bank of Worland and since the suit and attachment the defendant and his wife had been using this money for their living expenses. It also appeared that when the defendant first solicited a loan from the plaintiff in March, 1918, he made a statement of assets and liabilities showing assets amounting to $11,653.00 and liabilities of $5,195, or a net worth of $6,458. The only evidence offered as to the last ground in the affidavit for attachment "that the defendant was about to become a nonresident of the State of Wyoming with intent to defraud his

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creditors" is a statement he is said to have made to Cureton during the pendency of the deal when Cureton was inquiring about getting a house to live in, "that he was going to go into the army if possible", and as Cureton said: "He told me he was going to leave town and I could get his house he was living in" and "I am living in a four-room house. You can get that if you want it", and he told Muirhead, the vice president and manager of the plaintiff bank, that "he was going to Denver to get a job with Davis Brothers".

In attachment proceedings, before debt due, the grounds are not only certain things were done by the defendant that are given in the statute as grounds for attachment, but these things must be done to hinder, delay and defraud creditors, in other words, the gist of the matter is the intent of the debtor to defraud his creditors, and with that intent he does the acts alleged; if he does the acts for a lawful and legitimate purpose an attachment will not lie and will be allowed only upon the grounds and conditions of the statute providing for attachment before debt due (2 R. C. L. 814). In this case each ground stated in the affidavit alleges the "intent to defraud his creditors" and the traverse specifically denies this fraudulent intent. So the whole matter resolves itself to, Did the defendant Millard dispose of his property with intent to defraud his creditors? and the burden of proving this intent to defraud was upon the plaintiff.

The whole evidence shows that he sold his drug business with the honest intent to pay his creditors, and he had drawn checks to pay all his debts that were due against the proceeds of the sale deposited in the plaintiff bank and they would all have been paid had payment not been stopped on the $3,500 check on the Citizens' National Bank of Cheyenne in the first place and then the plaintiff bank refusing to pay the checks of creditors as they came in, although it had a balance of over $1,600 to defendant's credit after deducting the $3,500 in order that it might hold this money to be applied on its not due notes. There was no effort to conceal the transactions from the plaintiff or any of his creditors,

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and the contract was placed in escrow in the plaintiff bank and all the proceeds of the sale were deposited with the plaintiff.

That a defendant has disposed of most of his property for the purpose of paying his debts and used the proceeds for that purpose does not show a fraudulent intent and is not ground for attachment (6 C. J. 59; Blakemore v. Eagle, 73 Ark. 477, 84 S. W. 637; Breeden v. Peale, 106 Va. 55, S. E. 2). In the last mentioned case the court said: "All that can be said is that Churchill owed a debt to Peale which he was unable to pay; * * * that he preferred other creditors, as he had a right to do; that he appropriated the proceeds of the property, sold at a fair price, to the satisfaction of claims of other creditors; and his purpose to make that sale was not only not concealed, but was discussed between the debtor and his creditor. These facts do not, in our judgment, make out the case stated in the affidavit for an attachment—that the defendant had disposed of or was about to dispose of his estate or some part thereof, with intent to hinder, delay, or defraud his creditors."

In the case of Iosco County Sav. Bank v. Barnes (Mich.), 58 N. W. 606, on page 608, the court said in reference to preferring some creditors to others: "It was to aid in carrying out the arrangement made, and to pay the interest on the amount necessary to do so. The keeping it away from one set of creditors to the advantage of another would be no evidence of fraud. He had a right to prefer one creditor over another, and to pay off one class first in preference to another."

The case of Tenney et al. v. Diss, 48 N. W. 877, is a Nebraska case where the statute being taken from Ohio is like ours and the facts are very similar to the case at bar, the case being brought and an attachment had on a note before it was due, the grounds alleged in the affidavit for attachment being the same as the first two grounds in the case at bar, a traverse was filed by the defendant and hearing had on a motion to dissolve the attachment. The court said: "The testimony shows that the defendant executed

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three chattel mortgages upon his stock of goods, the aggregate of which was about $2,600; that he was owing other debts, and that his creditors were pressing him for payment; that thereupon he sold the entire stock, subject to the mortgages, to one William Tuomey for about the sum of $1,400. This money, it is claimed and the testimony tends to show, was applied by the defendant in the payment of his debts. It does clearly appear that the defendant is a *bona fide* purchaser of the goods in question, and that there was no intent in purchasing said stock to defraud the creditors of the defendant. The order discharging the attachment is sustained by the clear weight of the testimony, and is affirmed."

In Wearne v. France, 3 Wyo. 273, 21 Pac. 703, it was held that the making preference of several creditors to others while a debtor held control over his property did not constitute a fraudulent disposition of his property within the meaning of the attachment law.

The sale did not injure the plaintiff and "to support the attachment it must be made to appear that the attaching creditor is injured by the transfer or disposition relied on" (6 C. J. 57; Zeigler v. W. J. & J. H. Cox, 63 Ill. 48; Keith & Co. v. McConald, 31 Ill. App. 17). In this last case it was said: "The act complained of in the affidavit must be injurious to the attaching creditor, though it is sufficient if the affidavit charges, in the language of the statute, that it operated to delay and hinder creditors, without the particular specification of injury to the plaintiff, which is to be implied." And again in regard to preferring creditors: "She had the right to prefer one creditor to another, and so doing (while carrying on her business and not being about to yield dominion of her property for the benefit of creditors), was not fraudulent, nor in a legal sense was it such hindrance or delay of creditors as might furnish ground for attachment by those who were unpaid."

It is claimed that the fact that certain debts were omitted from the list of creditors furnished by the defendant to the purchaser under an attempt to comply with the Bulk Sales law was fraudulent and gave ground for attachment. The

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Bulk Sales law does not provide that the sale shall be void by the omission of the seller to furnish a complete list of his creditors. It provides that in case the purchaser shall fail to demand a list of his creditors from the seller and shall not at least five days before taking possession of such merchandise or merchandise and fixtures or paying therefor notify "every creditor *whose name and address is stated in said list* or of which he has knowledge of the proposed sale and of the price, terms and conditions thereof" the sale shall be prima facie void as to creditors of the seller and upon application of any creditor of the seller the purchaser shall "become a receiver and be held accountable to such creditors for all goods, wares, merchandise and fixtures that have come into his possession by virtue of such sale" (Chap. 33, Sess. Laws of Wyoming, 1911, as amended by Chap. 14, Sess. Laws 1913).

In the case of International Silver Co. v. Hall (Ga.), 78 S. E. 609, 45 L. R. A. (N. S.) 492, the question was whether the omission of a creditor from the list furnished by the seller under a Bulk Sales law very like ours would render the sale void and the Supreme Court of Georgia held that it would not in the absence of knowledge or connivance by the purchaser.

As to the third ground for the attachment, That Millard was about to become a non-resident of the State of Wyoming with intent to defraud his creditors, it is evident that the evidence offered as to this is the statements of Millard that he intended to go into the National Army and that he intended to get a job with Davis Brothers of Denver, Colorado, fall far short of showing an intent to change his legal residence. The evidence introduced does not show any fraudulent intent on the part of the defendant nor any of the grounds alleged in the affidavit for attachment and the lower court could not do otherwise than sustain the motion discharging the attachment.

There is another reason why the attachment might have been discharged, although the record does not show that it was raised or referred to in the court below. At the time

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of the hearing the only property of the defendant that was pretended to be held under the order or writ of attachment was by reason of the answer of the Wyoming Sugar Company in answer to the notice of garnishment served upon it. It is peculiar that this answer was signed and sworn to by the same attorney as attorney for the sugar company, garnishee, who swore to the affidavit for attachment as attorney for the plaintiff. Without referring to the lack of ethics thus shown and the charge that an attorney in so doing comes near at least to acting on opposite sides of a matter it may be questioned if a mere attorney at law not being an officer of the corporation can make an answer to a garnishment for a corporation. But the answer itself shows that the corporation had given its promissory note payable to the defendant Millard dated March 1st, 1918, and due March 1st, 1923, interest payable annually. This answer was made Oct. 21, 1918, and therefore shows that at that time there was nothing due on this negotiable instrument to Millard or anyone else. Does such an answer attach or garnish anything? It is held generally "that the maker or endorser of commercial paper cannot be made a garnishee in an action against the payee or holder thereof prior to the maturity of such paper" (20 Cyc. 1006 and cases cited, 12 R. C. L. 789). In some states it is held that the proceeds of such a note are subject to garnishment, but it must be shown in order to hold the maker as garnishee that the note is still held by the defendant at not only the time of the answer of the maker as garnishee but also that it continues to be payable to the defendant at the time it is due and has not been endorsed and transferred to a *bona fide* holder. Drake on Attachments has an exhaustive discussion of this question extending over 14 pages and reviewing the views held by the courts of the various states under their several statutes, and in section 583, 5th Ed., says:

"§ 583. It is difficult to perceive any substantial justification of such a proceeding; while, obviously, it disregards principles which, by general consent, have been laid at the foundation of all attempts to subject garnishees to liability.

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It cannot be without benefit to recur to those principles in this connection. 1. Without dissent, it is impossible to charge a garnishee as a debtor of the defendant, unless it *appear affirmatively* that, at the time of the garnishment, the defendant had a cause of action against him, for the recovery of a legal debt, due, or to become due by the efflux of time. 2. The attachment plaintiff can hold the garnishee responsible (except in some few cases which have been referred to, and have no application here), only so far as the defendant might hold him by an action at law. 3. The garnishee is, under no circumstances, to be placed by the garnishment in a worse condition than he would otherwise be in. 4. No judgment should be rendered against him as garnishee, where he answers fairly and fully, unless it would be available as a defense against any action afterwards brought against him, on the debt in respect of which he is charged."

"§ 584. Applying these well-established principles to this subject, it would seem quite impracticable to charge the maker of a negotiable promissory note, as garnishee of the payee, so long as the note is still current as negotiable paper. This character it bears until it becomes due; and no operation which can be given to the garnishment of the maker, can change its nature in this respect."

"§ 585. While the note is current as negotiable paper, it is usually very difficult for the maker to say whether, at the time of the garnishment, it was still the property or in the possession of the payee. If he answers that he does not know whether it was so or not, certainly he should not be charged, because it does not *appear affirmatively* that he was, when garnished, indebted to the defendant; and unless that fact do so appear, no court can rightfully render judgment against him. The most that can be claimed is, that he *may* be so indebted, which is manifestly insufficient. The great fact necessary to charge him is not shown, but only conjectured. The whole matter is in doubt; and while in doubt the court cannot with truth record that the garnishee is found to be indebted to the defendant; and unless that

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be found by the judgment of the court, there is no ground for charging the garnishee * * *."

"But though the garnishee should answer that the defendant, at the time of the garnishment, was the owner of the garnishee's note, not then due, no judgment should be rendered against him, because *his obligation is not to pay to any particular person, but to the holder, at maturity, whoever he may be.* Can the garnishee, or the defendant, or the court, say that the defendant will be the holder of the note at its maturity? Certainly not; and yet to give judgment against the garnishee, necessarily assumes that he will be; or, in disregard of the contrary probability, holds the garnishee to a responsibility which he may have to meet again in an action by a *bona fide* holder at maturity." And concludes in section 587 as follows: "The foregoing considerations lead to the conclusion that, as a general rule, the maker of a negotiable note should not be charged as garnishee of the payee, under an attachment served before the maturity of the note, *unless it be affirmatively shown, that, before the rendition of the judgment, the note had become due, and was then still the property* of the payee." And this conclusion is sustained by an examination of our statutes on attachment and garnishment. Section 4864, Wyo. Comp. Stat. 1910, provides: "The garnishee shall stand liable to the plaintiff in attachment for all property of the defendant in his hands, and *money and credits due* from him to the defendant, from the time he is served with the written notice mentioned in § 4856."

Section 4876 provides that the court may order the garnishee to pay into court the amount that his answer shall show he was indebted to the defendant, or if the court permit the garnishee to retain the "amount owing" he shall be required to furnish an undertaking to the plaintiff for the payment of the amount. It is evident that this could not apply to the amount of a note not due as in this case, for more than three years and to whom it may be payable when due the garnishee can in the nature of things not know. In the case of Knisely v. Evans, 34 Ohio St. 158, from

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which state our statutes on attachment and garnishement are taken, the court held that where a negotiable note had been transferred by endorsement even after maturity, the amount due on the note can not be garnisheed in the hands of the maker whether he has notice of the transfer or not as a debt due to the original holder.

In addition to the fact that the answer of the garnishee shows that the note was not due for over three years and there is no evidence going to show where the note was or who was the holder at the time of the hearing except that the plaintiff examined the defendant as its witness and asked him, "You had no other property after you sold out except the proceeds of the sale." To which he answered, "No, sir." This would go to show that this note had been negotiated and was not the property of Millard at the time of the hearing; and from this testimony the plaintiff argues that he was and pronounced himself insolvent and that the hearing showed that several thousand dollars of assets had disappeared from the time he had commenced business with the plaintiff bank without explanation therefore "compels the conclusion that he had disposed of his property with intent to defraud his creditors" and justified the attachment. Such fact in itself would not be ground for the attachment, and if he was still the owner of the note so that a garnishment would lie at all as to it from the evidence he was far from insolvent, but had a substantial balance over all his debts and liabilities.

Under the circumstances and evidence in this case there was nothing held by the garnishment and no property held under the attachment writ.

The order and judgment of the District Court will be affirmed. *Affirmed.*

BEARD, C. J., and POTTER, J., concur.

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McGINNIS v. BEATTY.

(No. 909; Decided January 10, 1920; 186 Pac. 120.)

APPEAL AND ERROR DISMISSAL—FAILURE TO SHOW JUDGMENT ENTRY IS GROUND OF DISMISSAL—JURISDICTION NOT CONFERRED BY APPEARANCE NOR BY CONSENT WHERE RECORD FAILS TO SHOW ENTRY OF JUDGMENT—JURISDICTIONAL REQUIREMENTS AS TO SUCH MATTERS CANNOT BE WAIVED.

1. Where the record on appeal does not contain a certified copy of the entry of the order of judgment appealed from, or such copy of any journal entry, the appeal will be dismissed.
2. Appearance by Appellee while sufficient as a waiver of lack of jurisdiction of the person, does not confer jurisdiction of the subject matter or cause, where the appeal record does not show the entry of judgment below.

APPEAL from District Court, Niobrara County, HON. E. C. RAYMOND, Judge.

Action by Chas. F. McGinnis against J. A. Beatty. From a judgment for plaintiff, defendant appeals. Heard on motion to dismiss.

M. H. Neil and *Kinkead & Henderson,* for the motion.

The record on appeal fails to show entry of judgment and also fails to show that notice of appeal was served within 10 days of the entry of judgment; this court is without jurisdiction to consider the appeal (Culbertson v. Ainsworth, 181 Pac. 418); the defect cannot be cured by affidavits (Hahn v. Bank, 25 Wyo. 467, 171 Pac. 889, 172 Pac. 705); jurisdiction of the subject matter on appeal cannot be conferred by consent of parties; the record on appeal is fatally defective and appeal should be dismissed.

Mentzer & Wilcox, for appellant.

Respondent waived all questions of notice by entering a general and voluntary appearance, including a stipulation for a continuance. No question of jurisdiction was raised and he should be considered in court for all purposes (Honeycutt v. Nyquist, 12 Wyo. 183, 1 Wrds. & Phr. 450, 11 N. W. 132); the appearance of respondent was general

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(2nd Ency. Pl. & Pr. 625); the test is whether the appearance is other than to question the jurisdiction (Sit You Guire v. Heard, 120 Pac. 1135; Belknap v. Charlton, 25 Ore. 41; 34 Pac. 758; Swecker v. Reynolds, 246 Pa. 202); where an appearance is made, the parties cannot afterwards object to the jurisdiction of the court (44 Ohio State; Fraizer v. Douglas, 48 Pac. 36, 21 R. C. L. 592).

BLYDENBURGH, JUSTICE.

This case is here on direct appeal and was heard on a motion to dismiss the appeal. The motion is based on the ground that "This court never acquired and is now without jurisdiction of said cause on appeal for the following reasons." Then follows four separately stated matters in which it is claimed that the requirements of the statute governing direct appeals to this court have not been complied with. It is not necessary to consider these reasons separately as the underlying fact appears that the record on appeal does not contain any certified copy of the entry of the order or judgment appealed from or any certified copy of any journal entry at all. There does appear a paper entitled, "Order on motion to vacate judgment", signed by the trial judge, which paper has the endorsement on the back, "Filed March 5, 1917, A. L. Miller, Clerk of Court". There is nothing to show that this paper was ever entered on the journal of the court or that it is a copy of any entry. The certificates of the Clerk and the Judge to the so-called record on appeal do not refer to any judgment or to this order or to any entry of the same. The facts in this respect are entirely similar to those in Hahn v. Citizens State Bank, 25 Wyo. 467, 171 Pac. 889, 172 Pac. 705, in which case this court held that it must appear from the record on appeal that the judgment appealed from had been entered on the journal and the date of the entry, and this should be shown by a certified copy of such journal entry; that a condition of the record such as exists in this case does not show any judgment or final order was entered, and that in such case this court does not acquire any jurisdiction of the appeal.

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Counsel for appellant contends that the respondent has appeared generally in this case in this court by filing a brief on the merits and joining in a stipulation for a continuance for the term prior to filing the motion to dismiss and therefore cannot now be heard on a motion to dismiss for lack of jurisdiction. In fact, the entire brief filed on behalf of appellant on the motion to dismiss is taken up with the argument that the respondent has made a general appearance, "is in court", and thus this court has "jurisdiction to render a full, complete and final order in this cause", and that respondent cannot now "be heard to raise any jurisdictional question". Counsel have failed to observe the distinction between jurisdiction of the person and jurisdiction of the subject matter or cause. By a general appearance, lack of jurisdiction of the person may be waived, but not of the subject matter or of the cause. It is well established that under appeal statutes whatever is required to be done to give the appellate court jurisdiction of the appeal cannot be waived, nor can jurisdiction of a cause on appeal be conferred by consent, and it was so expressly held by this court under our statute for direct appeals under which this cause was attempted to be brought here, in Culbertson v. Ainsworth, 181 Pac. 418.

The motion will be sustained and the appeal dismissed and it will be so ordered. *Appeal dismissed.*

BEARD, C. J., and POTTER, J., concur.

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IN RE. CADWELL'S ESTATE.
MORALEE, ET AL. v. CADWELL.

(No. 947; Decided January 21, 1920; 186 Pac. 499.)

ADOPTION OF CHILDREN WAS UNKNOWN TO THE COMMON LAW—STATUTES RELATING TO ADOPTION AND DESCENT ARE TO BE CONSTRUED TOGETHER—EXPRESSION OF ONE EXCEPTION IN A STATUTE EXCLUDES ALL OTHERS—ADOPTED SON LEGAL HEIR OF FATHER'S INTESTATE BROTHER—DESCENDANT.

1. At the common law, adoption was unknown; therefore the law governing the adoption of minor children and the rights and liabilities emanating therefrom are governed purely by statutory provisions.
2. Statutes conferring on an adopted child the right to inherit property and the statute of descent and distribution relating to the same subject, should be construed together as one law.
3. It is a rule of statutory construction that the expression of one exception excludes all other exceptions.
4. The term "descendant", as used in Comp. Stat. 1910, Sec. 5727, Sub-Div. 2, includes an adopted child when considered in connection with the adoption statute, Comp Stat. 1910, Sec. 3964, which declares that an adopted child "shall be entitled to the same rights of person and property as the children or heirs at law of the persons thus adopting them, therefore, a son by adoption becomes the legal heir of the intestate brother of his adoptive father, who died before the intestate brother."

ERROR to the District Court, Carbon County; HON. V. J. TIDBALL, Judge.

In the matter of the estate of Willard Cadwell, deceased, wherein C. L. Moralee, and M. M. Moralee, also William P. Cadwell, filed petitions for distribution of the estate. There was a judgment in favor of Cadwell, and the Moralees bring error.

McMicken and McMicken, for plaintiffs in error.

The controversy hinges upon the meaning to be given the term "descendants" found in Sec. 5727, Div. 2, Comp. Stat. A descendant is one proceeding from an ancestor, an offspring near or remote (Centvic Progeny, Worcester Dict.). The force of the adoption statute (Sec. 3964) must be

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limited to heirship from the adoptive parents. The right of inheritance is limited to descendants (Bates v. Gillett, 132 Ill. 287); the term "descendant", as used in wills, means the issue of the body and does not include heirs generally (Hamlon v. Osgood, 1 Redf. Sur. 409, 417); the statute of descent controls (Knight v. Pottgieser, 176 Ill. 368, 52 N. E. 934; in Re. Waln's Estate, 189 Pa. 631); the terms "issue" and "descent" are employed interchangeably (Houston v. Read, 32 N. J. E. 591; Bryan v. Walton, 20 Ga. 480; Bates v. Gillett, 132 Ill. 287; Tompkins v. Verplanck, 42 N. Y. S. 412); a descendant is one who descends as offspring (Warden v. Taylor, 32 W. Va. 284; 2 Jarman Wills, 632; Hillen v. Iselin, 144 N. Y. 365, 39 N. E. 308; Twaites v. Waller, 133 Ia. 84; Hadcox v. Cody, 135 N. Y. 861); a Michigan statute providing that an adopted child shall become the heir at law of the person adopting it, does not make such child an heir of the kindred of the adoptive parent by right of representation (VanDerlyn v. Mack, 137 Mich. 146; 100 N. W. 278, 66 L. R. A. 437); such adopting child inherits from the adoptor only, but not through him from his ancestors (Phillips v. McConnica, 59 Ch. St. 1, 51 N. E. 445, 69 Am. St. Rep. 753; In re. Darling's Est., 159 Pac. 606 (Cal.); Ryan v. Foreman, 181 Ill. App. 262; Ryley v. Day, 88 Kan. 503, 129 Pac. 524); in Massachusetts it is settled that an adopted child takes only from adopting parents, despite statutory provisions that the adoptee shall for all purposes be regarded as the natural child of its adopting parents (Gammons v. Gammons, 212 Mass. 454, 99 N. E. 95, and other cases cited). Hosp. Co. v. Humphrey, 32 R. I. 318, is to the same effect. The same rule applied in Kentucky (134 Ky. 133, 136 S. W. 133), and in Illinois (Wallace v. Nolan, 246 Ill. 535). Cases cited by the counsel to the contrary are based upon statutes differing in terms from that of Wyoming.

N. R. Greenfield, for defendant in error.

Adoption was unknown to the common law (Corpus Juris, vol. 1, p. 1371); we get no light from that source (Humphry v. Davis, 100 Ind 216; Nugent v. Powell, 4 Wyo. 186);

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the status of an adopted child is fixed by the Wyoming statute (3964 C. S.), the statute of descent is 5727 C. S. Where the language of a statute is plain, there is no room left for construction (Rasmusson v. Baker, 7 Wyo. 128); the adoption statute, 3964, is plain in terms, containing but one exception, as to inheritance, which does not occur in this case. The term descendant includes adopted children as well as natural children (Flannigan v. Howard, 200 Ill. 396; Warren v. Prescott, 17 L. R. A. 435; Clark v. Clark, 85 Atl. 759, 1 C. J. 1399; Ryley v. Day, 129 Pac. 524; Estate of Numan, 7 Am. St. Rep. 146); when a legatee dies before a testator leaving an adopted child, such child takes under a statute preventing the lapsing of legacies (Sewall v. Roberts, 115 Mass. 262); questions of adoption and rights of inheritance are statutory (VanDerlyn v. Mack, *supra*); there is no reason for limiting the effect of the adoption statute (Boaz v. Sweaney, 99 Pac. 621; Anderson v. French, 93 Atl. 1042); such statutes are liberally construed (Glascott v. Bragg, 87 N. W. 852; Parson v. Parson, 70 Am. St. Rep. 894); decisions to the contrary are affected by provisions of statutes (In re. Burnett's Estate, 69 Atl. 74; Rasmusson Estate, 131 N. W. 325); in the absence of restrictions provided by statute an adopted child inherits collaterally (Shaick v. Howe, 114 N. W. 916); this court has followed the doctrine of liberal construction in such cases (Nugent v. Powell, *supra*); the Kansas statute relating to adoption prior to its amendment was identical in terms with that of Wyoming; the Supreme Court of Kansas, in the case of Ryley v. Day, 129 Pac. 524, decided prior to the amendment, held, that an adopted child could inherit collaterally a share that would have descended to her adopting mother.

MENTZER, DISTRICT JUDGE.

Willard Cadwell died intestate in Carbon county, Wyoming, on September 1, 1911. He was a resident of said county at the time of his death and left an estate therein consisting of real and personal property. He left no children

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or widow surviving him, and his father, mother, and all of his brothers and sisters died prior to the time of his death. His sister, Emma Cadwell, had intermarried with one Moralee, and left surviving her as her only heirs-at-law, and also surviving the said Willard Cadwell, two sons, to-wit: C. L. Moralee and M. M. Moralee, the petitioners in error. His brother, William H. Cadwell, left surviving him as his only heir-at-law, an adopted son by the name of William P. Cadwell, the defendant in error, who also survived the said Willard Cadwell.

The said adoption proceedings had taken place in said Carbon county on the 24th day of September, 1887, pursuant to the laws of the then territory of Wyoming, being the same provisions for the adoption of minor children as are now contained in chapter 267 of the Wyoming Compiled Statutes 1910. The estate of the said Willard Cadwell was administered in the District Court of Carbon county, and when it was ready for final distribution the plaintiffs in error, C. L. Moralee and M. M. Moralee, filed their petition for the distribution of said estate and prayed that all of the property belonging to said estate, after paying the debts and costs of administration, be distributed to them, share and share alike, as the sole and only heirs of the said Willard Cadwell, basing their claims on the fact that they were the nephews by blood of the said deceased.

The defendant in error, William P. Cadwell, also filed his petition for distribution of the said estate, alleging that he was an heir of the said Willard Cadwell, deceased, on account of his being an adopted son of William H. Cadwell, a brother of the decedent, and prayed that one half of the proceeds of said estate be distributed to him by reason of his said adoption.

The District Court found specifically that the said William P. Cadwell, defendant in error, was entitled to receive the same portion of said estate his adoptive father would have received had he survived his brother Willard, and decreed that one half of the proceeds of said estate be distributed to him, the defendant in error, and that the other

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one half of said estate be distributed to the plaintiffs in error, being the same portion their mother would have received had she survived her brother Willard.

The said C. L. and M. M. Moralee brought the matter to this court by petition in error.

The question to be determined by the court is whether the said Willard P. Cadwell, the adopted son of William H., a brother of the decedent Willard, who died intestate, and after the death of the said William H., had a right to inherit from the said Willard and participate in the distribution of his estate; in other words, does a son by adoption become the legal heir of the intestate brother of his adoptive father where the adoptive parent dies prior to the death of his said intestate brother. This is a question that has not heretofore been decided or considered by this court.

At the common law, adoption was unknown; therefore, the law governing the adoption of minor children and the rights and liabilities emanating therefrom are governed purely by statutory provisions. Also, the law governing descent and distribution of the property of an estate of a person dying intestate is purely statutory. Therefore, in determining whether or not the defendant in error has a right to inherit under the circumstances above stated, it is necessary to refer to and apply the statutes fixing and defining the property rights of an adoptive child, and also the statute providing for the descent and distribution of the property of an estate of a person dying intestate.

The statutory provision with reference to the rights of an adopted minor is found in Section 3964 of the Wyoming Compiled Statutes of 1910, which provides:

"Minor children adopted as aforesaid shall assume the surname of the person by whom they are adopted, and shall be entitled to the same rights of person and property as the children or heirs-at-law of the persons thus adopting them, unless the rights of property should be excepted in the agreement of adoption."

The statute of descent and distribution, in so far as it is applicable to the facts in this case, is found in subdivision 2

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of section 5727 of the Compiled Statutes of 1910, and is as follows:

"If there be no children nor other descendants, then to his father, mother, brothers and sisters and to the descendants of brothers and sisters who are dead (the descendants collectively taking the share their parents would have taken if living), in equal parts."

These provisions of the statute, in so far as they apply to the rights of an adopted child to inherit property, must be considered together and applied as one law to the facts in the case; that is, the statute defining the property rights of an adopted child must be considered with and as a part of the statute of descent and distribution. In re. George W. Walworth's Estate, 85 Vt. 322-33, where the court said: "Statutes conferring on an adopted child the right to inherit property, and the statute of descent and distribution, relate to the same subject and are *paria materia* and should be construed together as one law."

The same rule has been announced by the Supreme Court of California in the case of In Re. Darling Estate (Bosey v. Darling, et al.), 159 Pac. 606.

With this rule in view, let us proceed to determine whether or not the statutory provisions above quoted confer upon the defendant in error the right to participate in the distribution of the estate in question. It is conceded that had the defendant in error been the natural son of William H. Cadwell, his adoptive father, he would be entitled under the statute of descent and distribution to inherit one half of the property of the deceased Willard Cadwell, but he was only an adopted son; therefore, what distinction does the statute make between the right of an adopted child to inherit property and that of a natural child? The statute, section 3964, *supra*, provides that when children are adopted in the manner provided by law they shall be entitled to the same rights of property as the children or heirs at law of the adopting parent. This language is so plain, simple, broad, comprehensive, and unambiguous that it is not open to construction; it clearly in terms defines the right of an adopted child, so

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far as property is concerned, to be the same as the right of a natural child or heir at law of the adoptive parent. No other reasonable construction can be placed upon the language of the statute.

This rule as stated is of general application unless "the rights of property should be excepted in the agreement of adoption", as provided in the last clause of said section. This clause gives the right of the adopting parent, at the time of entering into the agreement of adoption, to except therefrom the property rights of the child he is about to adopt. In the event of such an exception the child so adopted would not be entitled to the same property rights as a natural child. No such exception, however, appears in the adoption proceeding referred to in this case. It is claimed, however, in argument that there is another exception to the general rule, and that is that the adopted child cannot inherit from the kindred of the adoptive parent. We find no language in the statute that would indicate that the legislature intended any such exception. If the natural child has a right to inherit from the kindred, the adopted child would be entitled to the same right by the express terms of the statute, and if the legislature intended to make any such exception it would have used some language indicating such intention.

There being but one possible exception (that is, by the adoptive agreement) to the general sweeping omnibus provision that the adopted child is entitled to the same rights of property as the natural child or heir at law of the adoptive parent, the rule that "an expression of one exception excludes all other exceptions" applies in favor of the adopted child.

In the case of Kroff v. Amrhein (Ohio) 94 Ohio St. 282, 114 N. E. 267, the court, in construing the general provisions of a statute which contained a certain exception, stated "The statute being remedial, naturally the exceptions should be strictly but reasonably construed, and must be governed by the familiar rule that the exclusion clearly made in the exception, only emphasizes the inclusion of all other

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things germane to the statute which are not so excluded."

It is contended with great earnestness by the counsel for the plaintiff in error that the term "descendant" used in the statute of descent and distribution, subdivision 2, sec. 5727, *supra,* excludes an adopted child. It is true that a "descendant" is one who descends from an ancestor, as "child", "children" or "issue". The descendants of a person are his children, grandchildren, great grandchildren and other issue to the remotest degree. "Descendant" is a broader term than "child" or "children", but according to all of the authorities the term "descendant" includes "child" or "children". It also includes "issue". Therefore, if a natural child, being a "descendant" of its father, has a right to inherit property from his deceased father's intestate brother, an adopted child who "is entitled to the same rights of property as children or heirs at law of its adoptive father", has a like right to inherit property from his deceased adoptive father's intestate brother. If the adopted child has not such right then a portion of the adoption statute must be nullified and we must engraft upon it an exception which, in our judgment, is not warranted by the language of the statute.

It has been held by the Supreme Court of Kansas, in the case of Riley v. Day, 44 L. R. A. 296, that the term "child" and the term "living issue", as used in the statute of descent and distribution, included an adopted child. It was held in the same case that under a statute whose terms are identical with sec. 3964, *supra,* an adopted child may inherit as the "living issue" of a deceased brother or sister of the decedent.

In the case of Warren, Admr., v. Prescott (Me.), 17 L. R. A. 435, it was held that the term "lineal descendant" used in a statute of descent, included an adopted child.

In California, where by statute an adopted child is "regarded and treated in all respect as the child of the person adopting", and is to "have all the rights and be subject to all the duties of the legal relation of parent and child", the word "issue" as used in a statute providing that if a de-

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cedent leave no surviving husband or wife, but leaves issue, the estate goes to such issue, "issue" being used in the sense of "child" or "children", was held to include an adopted child (In re. Newman Estate, 75 Cal. 213, 16 Pac. 887).

Also the term "issue" as used in statutes of descent and distribution, has been held to include an adopted child in the following cases: Buckley v. Frazer, 153 Mass. 525, 27 N. E. 768; Atchison v. Atchison, 89 Ky. 488, 12 S. W. 942.

The Supreme Court of the State of Washington, in the case of In re. Masterson's Estate (McManus v. Loyd), 183 Pac. 93, in construing and applying a statute very similar in its provisions to the adoption statutes of the State of Wyoming, says: "One of the rights and privileges of a natural child is to inherit from a brother or sister, a natural son or daughter of the same parents. If the adopted child does not have the same right then it is denied a right or privilege which the natural child has." And the court held that: "An adopted sister is entitled to inherit along with the natural brothers and sisters of one dying without issue, husband, wife, father or mother."

We are therefore of the opinion that the term "descendant", as used in our statute (sub-division 2, sec. 5727, *supra*), includes an adopted child when considered in connection with the adoption statute (Sec. 3964, *supra*), which declares that an adopted child "shall be entitled to the same rights of person and property as the children or heir-at-law of the persons thus adopting them."

Therefore, the District Court rightly held that William P. Cadwell, the defendant in error, was entitled to inherit one half of the property left by the decedent, Willard H. Cadwell, after the payment of debts and costs of administration.

Our attention has been called to numerous decisions from other states in which adoption statutes have been enacted. The statutory provisions in these several jurisdictions are practically all different from the provisions under consideration here. In some of the decisions the language of the statute under consideration is much more restricted than

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the language in our statute, and in others the express terms of the statute would indicate that the legislature intended to limit the right of the adoptive child to inherit from the adoptive parents only. We deem it unnecessary to review these cases here as each decision is based on the language of the particular statute under consideration. Some of the cases also are determined upon a strict or liberal construction of the statute, but as we have expressed the view that the language of our statute is clear and unambiguous and not open to construction, therefore, these cases would not be controlling.

The decision of the District Court is therefore affirmed.

Affirmed.

BEARD, C. J., and POTTER, J., concur.

BLYDENBURGH, J., having announced his disqualification to sit in the case, HON. WILLIAM C. MENTZER, Judge of the First Judicial District, was called in and sat in his stead.

RICHARDS v. RICHARDS.

(No. 965; Decided January 30, 1920; 186 Pac. 1107.)

APPEAL AND ERROR—ACCOUNTING—FINDINGS ON CONFLICTING EVIDENCE NOT DISTURBED—EVIDENCE OF PARTNERSHIP—PARTNERSHIP—ANSWERS TO INTERROGATORIES—PLEADING—AMENDMENT AFTER EVIDENCE IS NOT ALLOWED EXCEPT TO CONFORM TO FACTS PROVEN.

1. Findings of the trial Court upon conflicting evidence, in a suit by a partner for an accounting, to the effect that a co-partnership exists between plaintiff and defendants and that defendants claim that the money furnished by plaintiff was a mere loan to them was not sustained by the evidence, will not be disturbed on appeal.
2. Where answers to interrogatories were not offered in evidence by either party, and defendants testified to the same matters while on the stand, any error in the order requiring defendants to answer such interrogatories, attached to the reply, was harmless to them.
3. Refusal of the trial court to allow defendants to amend their answers after the evidence had all been introduced

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was properly refused, for such proposed amendment would not conform to the proof as found by the Court from the evidence.

ERROR to the District Court, Carbon County; HON. V. J. TIDBALL, Judge.

Suit by Chris C. Richards against John W. Richards and others for the dissolution of a co-partnership, a determination of the interests of the respective partners and an accounting. There was a decree for plaintiff and defendants bring error.

N. R. Greenfield and *A. McMicken,* for plaintiffs in error. The court erred in overruling defendant's demurrer to interrogatories attached to the reply; said interrogatoies were improper under the statutes (4419, 4420 C. S., 14 Cyc. 342; Chapman v. Cree, 45 O. St. 357; Mulhern v. Gove, 70 N. W. 15; Telephone Co. v. Eureka, 122 Fed. 960). The court erred in refusing defendants leave to amend their answers to meet amendatory matter in the petition (4437, 4438 C. S.; Cartwright v. Ruffin, 43 Colo. 377, 96 Pac. 261; 31 Cyc. 459; Stand. Ency. Proc. vol. 1, p. 627). In determining whether a partnership exists, the courts have adopted five general tests: 1. In determining whether the relation is one of partnership, the intention of the parties governs. 2. Mutual agency is a test of intention to form a partnership. 3. The right of control over property or over profits with power of disposition. 4. Whether there was mutual assent. 5. Community of interests. The evidence in the present case does not measure up to the above named tests (Channel v. Fassett, 16 O. 169; 30 Cyc. 357; Watson v. Bayliss, 71 Wash. 489, 128 Pac. 1061; Holgate v. Doner, 8 Wyo. 344); defendants in error having failed to establish an express agreement of partnership, urged that partnership might be implied from the conduct of the parties; one cannot recover on an implied agreement where he alleges an express agreement (11 Stand. Proc. 1041, and cases cited; 22 Ency. Pl. & Prac. 580; Cremer v. Miller, 56 Minn. 52; 57 N. W. 318); the evidence was insufficient to establish a partner-

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ship (Bennett v. Bennett, 163 Pac. 814; Donahue v. Henighen, 147 N. W. 464; Brown v. Houchin, 133 S. W. 680 (Mo.); Spurlock v. Wilson, 142 S. W. 363 (Mo.); Sawyer v. Burris, 121 S. W. 321 (Mo.); Chapin v. Cherry, 147 S. W. 1084 (Mo.); Denney v. Brown, 193 S. W. 552 (Mo.); Crawford v. Wiedeman, 166 S. W. 595 (Ky.); Reynolds v. Jackson, 26 Cal. App. 490, 144 Pac. 305; Miller v. Baker, 140 N. W. 407; Brown v. Brown, 141 N. W. 553; Miller v. Casye, 142 N. W. 589; Johnson v. Hohn, 162 N. W. 679; Colier v. DeJernett, 56 So. 101; Balles v. O'Brien, 59 So. 133; Haswell v. Standring, 132 N. W. 417 (Ia.); Shendan v. Reese, 48 So. 443 (La.); Weisse v. Hamilton, 105 Pac. 74 (Mont.); Mancuse v. Rasso, 116 N. W. 679 (Neb.); Hoffecker v. Austin, 81 Atl. 864 (N. J.). When the facts are ascertained the intention to form a partnership becomes a question of law (Nelms v. McGraw, 93 Ala. 245; Moore v. Smith, 19 Ala. 774; Fall v. McRae, 36 Ala. 61; Oliver v. Gray, 4 Ark. 425; Hazzard v. Hazzard, Fed. case No. 6279 (15 Tory 371); Smith v. Knight, 71 Ill. 148; Macey v. Combs, 15 Ind. 469; Loomis v. Marshall, 12 Con. R. 69; Kellogg Newspaper Co. v. Farrell, 88 Mo. 594). Mutual agency as a test of co-partnership (Story on Part., sec. 1, p. 208; Eastman v. Clark, 33 N. H. 376; Walker v. Clark, 8 Ia. 474; Davis v. Richardson, 45 Miss. 499; Harvey v. Childs, 29 Ohio St. 319; Babcock v. Stewart, 58 Pa. 179, 20 Cyc. 446; Croswell v. Lehman, 54 Ala. 363). Right of control over the property of profits with power to dispose of assets, management, etc. (Dwinel v. Stone, 30 Me. 384; Bradley v. Goddard, 49 Me. 115; Thord v. Marsh, 40 Miss. 158; Donnel v. Harsh, 67 Mo. 170; Musser v. Brink, 68 Mo. 242; Conklin v. Barton, 43 Barb. 435; Voorhees v. Jones, 29 N. J. L. 270; Kellog v. Griswold, 12 Vt. 291; Holgate v. Downer, 8 Wyo. 344). Community of interest of co-partners (Bradley v. Ely, 24 Ind. App. 2; S. C. 56 N. E. 44; S. C. 79 Am. St. Rep. 251; Roper v. Schaefer, 35 Mo. App. 20). The findings of the trial court as to the respective interests of the parties is not sustained by the evidence; there was error in ordering an accounting.

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L. E. Armstrong, Brimmer & Brimmer, and *N. E. Corthell,* for defendant in error.

The case turned in the trial court upon the question of whether the co-partnership was confined to John and Fred Richards, or also included Chris; there was a conflict of evidence and the trial court found in favor of plaintiff below; it is submitted that a partnership existed and the finding that there should be an accounting is amply sustained by the evidence; this finding will not be disturbed if there was evidence to sustain it (Ketcham v. Davis, 3 Wyo. 164, 167; Columbia C. M. Co. v. Dutchess M. M. & S. Co., 13 Wyo. 244, 256; Slothower v. Hunter, 15 Wyo. 189, 204; Riordan v. Horton, 16 Wyo. 362, 374; Yount v. Strickland, 17 Wyo. 526, 534; City of Rawlins v. Murphy, 19 Wyo. 238, 252; Saratoga Land & Inv. Co. v. Jensen, 20 Wyo. 323; Stockgrowers' Bank v. Gray, 24 Wyo. 18, 40; Hunt v. City of Laramie, 181 Pac. 137, 139). It is needless to enter into a discussion of the legal elements and tests of partnership; a partnership agreement may be written or oral; the intention of the parties governs (Bank v. Butler, 149 Ill. 575, 36 N. E. 1000; Bentley v. Brossard (Utah), 94 Pac. 736); an express agreement is not indispensable (Meehan v. Valentine, 145 U. S. 611); in the absence of an express agreement, partners will be held to share equally in profits and losses (Paul v. Cullum, 132 U. S. 539); but the mere sharing of profits does not create a partnership; an essential element is the obligation to share losses also (Haswell v. Standring, 132 N. W. 417); mutual agency, an assertion or a common control of partnership property are not elements or essentials of a co-partnership (22 Am. Ency. of Law 23); the fact that one partner did not take as active an interest as the other partners does not affect a right to share in the profits (Botsford v. Von Riper, 110 Pac. 705; Saunders v. McDonough, 67 So. 591); the name under which the partnership is carried on is not important, they may use any name they choose (Painter v. Stahley, 15 Wyo. 510, 520; Crable v. O'Connor, 21 Wyo. 460). The law regards the conduct rather than the words of the parties in determining whether there is a

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partnership (30 Cyc. 352, 353; Sullivan v. Sullivan, 122 Wis. 326, 99 N. W. 1022; Niroad v. Farnell (Cal.), 106 Pac. 252-253; Mendonca v. Russels (Ok.), 150 Pac. 1061-1062; Bartell v. Smith (Wis), 129 N. W. 782-783; Shriver v. McCloud (Neb.), 30 N. W. 534, 535, 536; Reeves v. Jordan (Ala.), 72 S. 322). Where different persons unite their capital or efforts for a common purpose and disagree upon a division of the proceeds, the court should determine the dispute, irrespective of whether the investments are equal or unequal (Knapp v. Hanly, 10 Mo. App. 353, 83 S. W. 1005-1008; Wetmore v. Crouch (Mo.), 51 S. W. 738; Botsford v. Van Riper (Nev.), 110 Pac. 705; Saunders v. McDonough (Ala.), 67 S. 591-595; Lind v. Webber (Nev.), 134 Pac. 461-465; Rankin v. Block, 38 Minn. 650-658; Fountain v. Menard (Minn.), 55 N. W. 601; Harris v. Carter (Mass.), 17 N. E. 649); the findings of the court were favorable to the plaintiff; a litigant may require disclosures by annexing interrogatories to his pleading (4419 C. S., 6 En. Pl. & Pr. 758); but the questions must be directed to material facts (Robbins v. Co., 61 N. E. 265; Grebenstein v. Corp., 91 N. E. 411); the court erred in refusing defendants leave to amend their answer (Kuhn v. McKay, 7 Wyo. 42; C. B. & Q. R. R. Co. v. Pollock, 16 Wyo. 321).

BEARD, CHIEF JUSTICE.

The defendant in error, Chris C. Richards, brought suit in the District Court of Carbon County against the defendants in error, John W., and Fred R. Richards, and Charles Travis. The petition is too lengthy to be here set out, but the substance of the averments thereof which are necessary to present the questions in the case here are that, about April 28, 1900, the three Richards entered into an agreement to become partners in the sheep, livestock and ranch business, under the firm name of Richards Bros., each paying into the partnership account the sum of $500.00, and were to be equal partners in said business, John W. and Fred R. to devote their entire time to the firm business, and Chris

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C. to devote such time to it as his other labors would allow. That about Nov. 1, 1900, said Travis became a member of said firm, investing the sum of $800.00. That in the fall of the year 1907, the members of the firm attempted to state the amount of their respective contributions to the capital of said firm in the following amounts, to-wit: John W. Richards, $5,300.00; Fred R. Richards, $1,000.00; Charles Travis, $800.00, and Chris C. Richards, $836.00. That by mistake the amount thus stated as contributed by John W. was overstated in the sum of $2,000.00. That the business was continued under the readjustment of the respective interests until the commencement of the action August 4, 1915. By amendment made during the trial or at the close of the evidence, plaintiff alleged that said Travis some time during 1915 sold his interest in said business and retired from said firm, receiving payment therefor in part from the funds of the firm and in part by a note signed by Richards Bros. He prayed for a dissolution of the firm, a determination of the interest of the respective partners, an accounting, &c.

The defendants below filed separate answers, the answers of John W. and Fred R. Richards being identical, and specifically denied the allegations of the petition except that they admitted that the firm of Richards Bros. existed and alleged that it was composed of themselves only. Alleged that the plaintiff below, Chris C. Richards, loaned to said firm the sum of $836.00, which had been fully paid.

By reply plaintiff denied that he loaned the firm the money as alleged or that it had been repaid.

The defendant Charles Travis answered, denying that at the date of his answer, February 19, 1916, he had any interest in the firm of Richards Bros., and averred that for a long period of time he was interested in said partnership, having invested the sum of $800.00 in said company in November, 1900; that the exact interest in percentage in said business which was held by him was unknown to him; that on November 17, 1915, he sold all of his interest in said company to John W. Richards and Fred R. Richards,

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and received payment for said interest from them. To his answer there does not seem to have been any pleading filed.

On the trial, the court found generally in favor of the plaintiff Chris C. Richards, and against the defendants, John W. Richards and Fred R. Richards, and that those three parties on or about April 28, 1900, entered into a co-partnership and as such engaged in the sheep, livestock and ranching business. That about November 10, 1900, defendant, Charles Travis, was admitted as a co-partner in said business; that the co-partnership so continued until about December 1, 1915, when Travis retired from the firm and received from the remaining co-partners full compensation for his interest therein; that the co-patnership consisting of the three Richards thereafter continued and is still in existence. That it was agreed between the plaintiff and the defendants, John W. and Fred R. Richards, that their respective interests in said co-partnership should be in proportion to the amounts of money and time by them respectively contributed thereto. Found that the interest of the plaintiff, Chris C. Richards, was 12½ per cent of the total thereof, and that of said defendants 87½ per cent. That no specific period was agreed upon for the existence or continuance of said co-partnership; that plaintiff was entitled to have the co-partnership dissolved, its affairs wound up and its net assets, after the payment of its debts, distributed among the co-partners in proportion to their respective interests as aforesaid. An interlocutory decree was entered accordingly, and a special master appointed to take an accounting of the assets and liabilities of the co-partnership and report to the court. From that decree the defendants, John W. and Fred R. Richards, bring the case here by proceedings in error.

Counsel for plaintiffs in error state the issues in the case in their brief as follows: "The questions to be determined in this proceeding are: 1. Is there a partnership existing between the plaintiff and the defendants, Richards? 2. If such partnership exists, what are the respective interests of

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the partners?" It is the contention of plaintiffs in error that the finding of the court on neither of those questions is sustained by sufficient evidence. The evidence is voluminous and conflicting and it would be a useless task to attempt to review it at length here. There was no written agreement between the parties, and whether or not a partnership exists between them must be determined from their conflicting testimony as to their agreement and their subsequent conduct. The parties are brothers, and the testimony of Chris C. is to the effect that in April, 1900, the three agreed to engage in the sheep business, each to contribute to the capital of the firm, John W. and Fred R. to devote their entire time to the business, and he to devote such time as his other work would permit, and that they were to share in the business in proportion to the amount of capital invested and time employed in the business by each of the partners. That at the start he furnished $500.00, and various other sums thereafter, which were used in the business, and devoted considerable time in the conduct of its affairs. The contention of the defendants, John W. and Fred R. Richards, is that there was no agreement of partnership except between themselves and that whatever money was furnished by Chris C. was simply loaned to them, for the use of which they were to pay the usual rate of interest, and more if the business was prosperous and they could afford to do so. Their testimony is to that effect, although their recollections of what was said and done appear to be quite dim. A certain book of accounts, admitted to have been kept by John W., is in evidence, in which the first entry therein is as follows: "1900, Apr. 28, J. W., F. R. & C. C. Richards Bot of Cosgriff Bros. 500 ewes @ $4.65 per head, $2,325.00. Share as follows:

C. C. Richards	$500.00
F. R. Richards	912.50
J. W. Richards	912.50"

Then follows several pages of personal accounts of the parties and an expense account. On page 70 of said book the following entry appears:

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"Hanna, Wyo., Nov. 1st, 1900.

Charles Travis, C. C. Richards, J. W. Richards, and F. R. Richards have this 10th day of November, 1900, engaged in the sheep business under the name of Richards Bros., with amounts invested as follows:

Chas. Travis	$ 800.00
C. C. Richards	742.66
J. W. Richards	2,769.12
F. R. Richards	2,769.12
	$7,080.90"

Follows by accounts headed "Richard Bros.", in which name the business has since been conducted. Travis is a brother-in-law of the Richards. No note or other evidence of indebtedness was given to either him or plaintiff for the money furnished by them. Travis testified that in November, 1900, he put $800.00 into the business and was to draw his portions of the dividends, up until 1907, when he and John W. had a verbal agreement that he was to get $200.00 a year on his investment. It appears he retired from the firm in 1915, his interest being paid for out of the funds of Richards Bros. Dec. 1, 1907, a set of books of the firm of Richards Bros. was opened containing a list of the resources and liabilities of the firm, in which plaintiff is credited with investments to the amount of $820.00. By the monthly trial balances from January 1, 1908, to and including July 1, 1916, the stock account of the respective parties, with the exception of one month, is entered as follows: J. W. Richards, $5,300.00; F. R. Richards, $1,000.00, and C. C. Richards, $836.00. The personal accounts of the parties also appear in the books. These books were opened by plaintiff. That is, he did the clerical work. The defendants testifying that they did not know from what source he got the figures; that they gave him very little information or assistance. Thereafter for part of the time the books were kept by plaintiff and for part of the time by Fred R. Richards. In 1913 the parties attempted a settlement of their affairs in which it appears they figured plain-

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tiff's interest at 15% compound interest on $500.00; but the settlement was not consummated, was disregarded by the parties and the business continued as before. In 1915, plaintiff was seeking a settlement of the company affairs, and the attorneys for the defendants, by their direction, wrote plaintiff a letter in which they state, "Your brothers have been to see us relative to the question of the settlement of your claim against their partnership. We have gone over the matter very thoroughly with them and have before us your various letters. We cannot see in any event how you can claim 15 per cent of the profits of the partnership, whatever they might be. According to the so-called trial balance of October 1st, 1914, which you refer to, the amount you contributed was only $836.00, which, according to the amounts the other brothers contributed, would be between 11 and 12 per cent, but as you say on one of your letters, the inventory, so-called, is antiquated." The letter then proceeds at length to state why certain property of the firm, particularly real estate, had not increased in value, and then proceeds: "In view of the fact that your two brothers have given their entire time and attention to this business and you have given little or nothing, your brothers thought it was proper and right that they should be allowed in any settlement, wages at the running rates for the work they have done, and as you have attended to the books at various times they were willing to allow you for whatever services you did, about $800.00, which seems to be extremely liberal. As it is impossible without a great deal of expense to get a true inventory and appraisement of the present values of all the property, they thought that it would be very equitable to offer you ten times the amount that you put in, or the amount of $8,360.00, as a settlement in full to be paid in this way" (stating terms of payment). "This seems to us to be a very liberal offer, in view of the fact that you have had from the proceeds of the business at various times $2,395.28, or nearly three times as much as you originally contributed." They then stated that the cash and notes had been sent to a bank with a release, and requested

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him to call there, sign and return the release, and then proceeds: "Should you refuse to settle in this way, the only method by which an equitable arrangement could be arrived at without litigation, which, of course, would cost a good deal of money to both sides, besides ill-feeling, would be for you to appoint one party and your brothers another, and those two select a third, and go over all the property of the company and make a fair value of it, and then have the matter figured out on a pro rata basis, giving, of course, to your brothers proper allowance for their work in running the business, and you such as would be equitable for attending to the books at the times you did. You can understand that this would cost a considerable amount of money, as to get the proper men to make these valuations and go over all the property of the partnership at this time would take some time and they would have to be well paid, which, of course, would have to come out of the partnership assets and leave that much less for your share."

The business of the firm was conducted by the defendants and when money was borrowed on its account the notes were signed "Richard Bros. J. W. Richards, F. R. Richards." And when written contracts were entered into they recited that Richard Bros. was a co-partnership composed of J. W. Richards and F. R. Richards, and their printed stationery contained the names of defendants only. There was also testimony of other parties that defendants had stated that plaintiff had an interest in the business. We have referred to so much of the evidence not only to disclose the conflict therein, but also to show that there was, in our judgment, ample evidence to support the finding of the trial court that a co-partnership exists between plaintiff and defendants, and that defendants' claim that the money furnished by plaintiff was a mere loan to them is not sustained. The court having found upon the whole evidence in favor of plaintiff on that issue, its finding should not be disturbed by this court.

On the other branch of the case—the interest of the respective partners—we think it impossible for any one to ar-

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rive, to a mathematical certainty, at the interest of each, and perhaps no two persons would arrive at the same result from the evidence in the record in this case. Counsel for the respective parties practically agree that the amounts invested by each of the parties as shown by the books from time to time contain errors, and that the other evidence in the case must be considered in arriving at a just and approximately correct result. The figures furnished us by counsel for plaintiffs in error, and which they argue are supported by the evidence, would reduce plaintiff's interest to 9¼ per cent. On the other hand, counsel for defendant in error furnish us with figures, which they likewise contend are supported by the evidence, which would increase his interest to at least more than 16 per cent; and if error was committed by the trial court in its finding, it was against their client. We have given careful consideration to the entire evidence in the record and believe the court arrived at substantial justice between the parties on the evidence presented to it.

Objection is made to the order of the court requiring the defendants to answer certain interrogatories attached to the replies. The answers to those interrogatories were not offered in evidence by either party, and the defendants testified to the same matters while on the stand, and it has not been made to appear that they were prejudiced even if the ruling as to certain of the interrogatories was erroneous.

Error is also assigned in the ruling of the court in refusing to allow defendants to amend their answers after the evidence had all been introduced. Such amendment at that time would be proper only in order to have the pleadings conform to the proof and as the proposed amendment would not conform to the proof as found by the court from the evidence, the amendment was properly refused.

Upon the whole record we do not discover any such prejudicial error as will entitle plaintiffs in error to a reversal of the judgment, and it is, therefore, affirmed.

Affirmed.

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POTTER, J., and ARNOLD, District Judge, concur.

HON. JOHN R. ARNOLD, Judge of the Third Judicial District, was called in and sat in place of Blydenburgh, J., who had announced his disqualification to sit in the case.

FAST v. WHITNEY.

(No. 918; Decided January 30, 1920; 187 Pac. 192.)

PLEADING—OBJECTIONS TO INTRODUCTION OF EVIDENCE CHALLENGES SUFFICIENCY OF PETITION—OIL LEASES—EXTENSION OF TIME FOR COMMENCING OF WORK—DEFECT IN PETITION CURED BY ANSWER—MINES AND MINERALS—WHETHER "DRILLING OPERATIONS" COMMENCED IS A QUESTION OF FACT—WORDS AND PHRASES.

1. Where objections to the sufficiency of a petition are made for the first time upon the trial, the pleading should be liberally construed and effect given to every legal intendment so that it may be sustained if possible.
2. A petition alleging that an oil lease carried certain quoted indorsements extending the time for plaintiff lessees to commence work, held, sufficient to show an extension of the lease as against an objection to the introduction of evidence made at the trial.
3. Any defects in a petition as to allegations of an extension of time granted to commence drilling operations under an oil lease, were cured by admissions in the answer that the time for such work was extended to the date mentioned in the petition.
4. Allegations that the lessees of oil lands had staked the location of the first well, had placed lumber on premises for repairing a derrick for drilling purposes, and had contracted for bringing a derrick upon the leased lands within the time prescribed for commencing drilling operations, and that within ten days after such time limit a derrick was installed on the premises despite difficulties caused by snow, etc., held, not to establish, as a matter of law, that the lessees had failed to commence "drilling operations" within the prescribed time.
5. An objection to the introduction of evidence upon the ground that the petition states no cause of action raises the question whether the pleading is legally sufficient.

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APPEAL from the District Court, Park County; HON. E. C. RAYMOND, Judge.

Action by James M. Fast and others against F. A. Whitney and another to enjoin lessors from asserting a forfeiture of an oil lease and interfering with drilling operations of lessees. There was a judgment for defendants and plaintiffs appeal.

C. A. Zaring and *R. B. Landfair,* for appellants.

The trial court, upon objections made by defendants to the introduction of evidence, ruled that the petition did not state a cause of action, dismissing plaintiff's action and entering judgment for defendants; the action was for injunction; it is a proper remedy where a lessor re-enters and claims forfeiture (Thornton on Oil and Gas, sec. 103; Gas Co. v. Poterie, 153 Pa. St. 10; Ohio Oil Co. v. Hurlbut, 7 Ohio Cir. Dec. 321); in construing a lease the entire instrument will be considered to arrive at the intention of the parties (Oil Co. v. Kelly, 6 O. C. D. 470; Elliott on Contracts, 1515); the intent is the essence of every agreement (Lachmund v. Sing, 120 Pac. 598); a lease will be construed most strongly against the lessor (24 Cyc. 915); staking out a location, contracting for lumber for rigs and cutting timber, is a commencement of operations (Duffield v. Russell, 65 O. St. 605); lessors are estopped from declaring a forfeiture (Thornton O. & G. 257); forfeiture of a lease will not be permitted where lessor has expended or is expending money without an opportunity first given to more speedily develop the property (Oil Co. v. Hurlbut, *supra,* 60 O. St. 613); justifiable delay will not work a forfeiture (Longworth v. Taylor, 1 Ohio Fed. Dec. 643).

E. E. Enterline and *W. L. Simpson,* for respondents.

The court sustained a demurrer *ore tenus* to the petition; respondents have moved to dismiss the appeal on the ground that the record on appeal does not show that it was filed in the office of the Clerk of the Trial Court as required by laws of 1917, chap. 32, sec. 4-10. Statutes must be com-

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plied with (2 R. C. L. 73); the allegations of the petition are insufficient to show commencement of drilling operations; there is a distinction between a commencement of operations and a commencement of drilling operations; there was no waiver by the lessors; there can be no waiver of a non-existent or lost right (40 Cyc. 258; Inv. Co. v. Marrow, 108 Cal. 490, 41 Pac. 487; Ins. Co. v. Lbr. Co., 11 Okla. 585, 61 Pac. 938); there are no allegations of estoppel in the petition (10 N. C. L. 149; Hallick v. Bresnahan, 3 Wyo. 73); respondents had a right to declare a forfeiture and to have the title quieted in them (Thornton on O. & G. 782; Huggins v. Daley, 99 Fed. 606; Detler v. Holland, 57 O. St. 492, 49 N. E. 690; Oil Co. v. Oil Co., 34 S. E. 923; Federal Oil Co. v. Western Oil Co., 121 Fed. 674, 57 C. C. A. 428; Iron Co. v. Trout, 83 Va. 397); the judgment below should be affirmed.

POTTER, JUSTICE.

This case is here on appeal. It is an action brought to enjoin the lessors from asserting a forfeiture of an oil lease and from interfering with the prosecution of drilling operations by excluding the lessees from the premises covered by the lease. The defendants having filed an answer and cross-petition, without previously objecting to the petition by demurrer or otherwise, interposed an objection on the trial to the introduction of any evidence by the plaintiffs on the ground that the petition does not state facts sufficient for a cause of action in favor of the plaintiffs or against the defendants. That objection was sustained; and thereupon the defendants introduced evidence in support of their cross-petition praying that their title to the premises be quieted as against any claim of the plaintiffs or either of them.

Judgment was rendered in favor of the defendants, whereby it was ordered that the plaintiffs take nothing in the action, that their petition be dismissed, and that the title of defendants to the premises covered by the lease be quieted as against the plaintiffs. The rulings of the court excluding all evidence by the plaintiffs, permitting evidence to be

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introduced in support of the cross-petition, and rendering judgment for the defendants, are specified as error. But the record does not show any exception to the ruling allowing the introduction of evidence under the cross-petition. An exception is shown to the ruling sustaining the objection to the introduction of any evidence by the plaintiffs, and also to the findings, decision and judgment. And the only questions presented here by the briefs relate to the sufficiency of the petition to state a cause of action.

The petition sets out the lease in *haec verba,* together with all endorsements thereon, and alleges that the plaintiffs, James M. Fast, R. B. Landfair and J. C. Reese are the owners and holders of said lease entered into between the defendants, F. A. Whitney and Leona G. Whitney, his wife, and J. C. Reese, on August 14, 1916. The premises, as described in the lease, are located in Park county, in this state. By the terms of the lease the lessor grants, demises and leases unto J. C. Reese, "all the oil, petroleum, gas, hydro-carbons, water and minerals of every kind and character whatsoever in or under said lands and the right to sever and remove the same; also the right to construct and maintain telegraph, telephone, pipe lines, roadways from adjoining lands on or across the demised premises; the right to construct and maintain buildings, derricks, tanks and other structures used or necessary for the boring or excavating, preserving and handling of oil, gas, hydro-carbons, water and other minerals produced on the demised premises. To have and to hold the same unto the said lessee for the full term of 5 years from and after the date hereof, and as much longer as either oil, gas, hydro-carbons, water and other minerals in paying quantities are produced, provided that all covenants and conditions hereof are fully kept and performed by the said lessee. Provided: The said lessee commences drilling on said lands or within a radius of one mile from said property within 60 days from the date hereof and carry forward the work of completion with all reasonable dispatch unless prevented by strikes, the elements, un-

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avoidable accidents or causes beyond the control of the lessee."

The lease contains also the following material provisions, stated in the order in which they are expressed in the lease: "In case no well be commenced at the place and within the time provided for herein, this lease shall become null and void and without any further effect whatever, unless lessee shall pay for the delay at the rate of.....cents per acre for each and every twelve months thereafter or until a well is commenced as provided for herein, or this lease be surrendered. Such payment may be made to the lessor at his address or be deposited to his credit in the First National Bank of Meeteetse, Wyo." "The lessee further agrees that drilling operations shall be commenced and diligently prosecuted on the lands specified in this agreement within 60 days from the date of this lease." The lease further provides that the lessee shall have the right and privilege at any time to assign, transfer or sublet the lease or any part thereof.

After setting out certain endorsements on the lease, alleging that the lease bears such endorsements, extending the lease, first, for 30 days from the date of the lease, and second, to December 14, 1916, and assigning one-third of the interest of the lessee, Reese, in the lease to R. B. Landfair and one-third to James M. Fast, and alleging that the lease, together with said endorsements, was filed for record in the office of the county clerk of Park County on December 16, 1916, the petition alleges as follows:

"Plaintiffs say they have performed each and every obligation of the said contract on their part to be kept and performed; that on the 12th day of December, 1916, the plaintiffs, together with the defendant, F. A. Whitney, proceeded to the premises described in said lease and set a 'stake' for the location of the first well on said premises; that on the 13th of December, 1916, plaintiffs caused to be placed on said premises lumber for the repair and addition of a derrick, for drilling purposes, that plaintiffs had contracted to be torn down from another location, about three miles

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away, and moved, and to be erected on the lands of the defendants.

"That the premises of defendants described in the contract of lease are about six miles up the Greybull River from Meeteetse, Wyo., and about 41 miles from a railroad. That during the month of December and after the commencement of the drilling operations herein set forth there was a great amount of snow on the ground for miles around Meeteetse, Wyo., and in and around the premises of the defendants and the hauling of material was almost impossible and it was difficult for workmen to get in and around said premises, but that on or about the 24th and 25th day of December, 1916, the plaintiffs caused said derrick, about three miles away, to be torn down and contracted with a teamster at Meeteetse, Wyo., to haul same to the premises of the said defendants. That arrangements were made about the 12th day of December, 1916, with the defendants to take care of the teamsters at their said premises and to take care of the rig builders. That the defendants, when the teamster stopped at their said premises, were told by the defendants they could not stay there, and defendants also refused to take care of the men engaged in tearing down the derrick, which made it a great inconvenience for plaintiffs, there being no other place of accommodation in the neighborhood, and plaintiffs were thereby put to a disadvantage in diligently proceeding to the development of said premises."

It is then alleged that before plaintiffs could proceed further with the drilling operations on said premises the defendants re-entered the premises without cause, and took possession thereof, and have excluded the plaintiffs therefrom since December 26, 1916, and caused written notice to be sent to the plaintiffs dated on that date, stating in substance that by reason of the failure of the lessee or his assigns to comply with the terms of the lease, the said lease is terminated, and they, the defendants, had re-entered into possession of the lands, and notifying the plaintiffs to remove therefrom and not to interfere with the possession

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of defendants. And: "That the said defendants reside at Meeteetse, Wyo., and at their said premises, and the bad condition of the weather and the roads were well known to them at the time, and no notice or request was made by the defendants, or either of them, upon the plaintiffs or either of them, that the said plaintiffs were not diligently prosecuting drilling operations on said premises of the defendants but the said defendants have since said 26th day of December, 1916, held said premises against said plaintiffs, although plaintiffs have been and are still ready, able and willing to keep and perform every obligation on their part to be kept and performed. That the said plaintiffs had before the receipt of the notice from defendants, herein set out, expended a large sum of money in prosecuting the drilling operations on defendants' premises, to-wit, in the sum of $700.00, and defendants knew, before they sent the above notice to plaintiffs claiming forfeiture, that plaintiffs were expending time and money in the prosecuting of drilling operations for oil and gas on their said premises and said defendants made no remonstrance or objection but acquiesced in the same and the only time that plaintiffs knew of any objection on the part of the defendants was the receipt of the notice of forfeiture from defendants."

The record does not show the specific objections urged against the petition upon the trial. But it is stated in the brief of appellants that the question before the court was, "What was the commencement of a well", or the "commencement of drilling operations", and that the position of defendants in the trial court was that a well was not commenced by setting a stake for its location and hauling lumber upon the premises for a derrick. And the principal objection urged against the petition in the brief of respondents is that it does not show that drilling or drilling operations were commenced within the time required by the lease. But they also present three points with reference to the endorsements upon the lease extending it: 1. That such endorsements do not show that additional time was granted for commencing drilling operations. 2. That

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neither endorsement shows any consideration for an extension; and that the petition does not allege a consideration therefor. 3. That the petition does not allege an extension of the time for commencing drilling operations.

The objections having been made and presented for the first time upon the trial, as grounds for objecting to the introduction of evidence, the petition is to be liberally construed and effect given to every legal intendment, so that it may be sustained if possible (City of Rawlins v. Jungquist, 16 Wyo. 403, 94 Pac. 464, 96 Pac. 144; Grover Irr. Co. v. Lovella Ditch Co., 21 Wyo. 204, 131 Pac. 43). In Rawlins v. Jungquist, this court said: "Where no objection to a pleading on the ground of its insufficiency has been made before trial, the most liberal construction will then be adopted to sustain it if possible, and the objection will not then be sustained unless there is an entire omission of a material fact or a total failure to state a cause of action or defense." And in the other case cited, we said that the rule permitting an objection to a pleading for the first time on appeal, on the ground of a defect in substance, excludes objections relating merely to the form or manner in which the cause of action is stated, and requires that the pleading be construed liberally and supported by every legal intendment, and therefore upheld if the necessary facts are fairly to be inferred from the allegations (See also, Cooper v. Hilsboro Garden Tracts, 78 Ore. 74, 152 Pac. 488; Thorp v. St. L. & S. F. R. Co. (Okla.), 175 Pac. 240; Hays v. Miller's Est., 189 Mo. App. 72, 173 S. W. 1096; Young v. Queen Ins. Co. (Mo. App.), 201 S. W. 940).

With reference to the endorsements upon the lease extending it, the petition alleges that the lease bears the following endorsements: Then is set out the endorsements, the first reading: "We hereby agree upon between Mr. F. A. Whitney and Leona G. Whitney, the lessor, and J. C. Reese, the lessee, that this lease shall be extended for thirty (30) days from date of this lease. F. A. Whitney. J. C. Reese. Signed in presence of W. P. Smith. L. B. Merrill." And the second: "November 6th, 1916. In con-

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sideration of the sum of one dollar, the time on the within lease is hereby extended to December 14th, 1916. F. A. Whitney. Leona G. Whitney. J. C. Reese. In presence of: R. B. Landfair. Subscribed and acknowledged before me this 6th day of November, 1916. Alex A. Linton, Notary Public. (Seal.) My Comm. expires Dec. 29th, 1918." We think this is sufficient as against the objection made upon the trial as an allegation that the lease or the time thereof was extended as stated in the endorsements, although it would, of course, have been better pleading to allege directly or in so many words that the time for commencing the work mentioned in the lease was duly extended and upon proper consideration. The agreement for the first extension is not dated, but the second is dated November 6, 1916, and for a stated consideration extends the time until a specified date. Neither agreement expressly refers to the time for commencing drilling operations or the drilling of a well. But the lease, dated August 14, 1916, is for the period of five years, and the agreement extending the time to December 14, 1916, could not have referred to or been intended to apply to anything but the time for commencing the work for which a limited time was fixed by the lease. Further, the answer filed in the case not only admits but avers, in effect, that the time for such work was extended to December 14, 1916. After admitting that the plaintiffs had been excluded from the leased premises the defendants "aver and say, that such exclusion was wholly within the terms and conditions of said 'Oil Land Lease', and after the abandonment and forfeiture of said premises by the plaintiffs and their assignee; and after re-entry of said premises * * * by the defendants, on the 14th day of December, 1916, the day and date of the termination of said lease under its terms and conditions." And there are other averments in the answer referring to that date as the expiration of the time limited for commencing the work; thus curing the defect, if any, in the manner of alleging the extension in the petition and waiving the objection. (Pomeroy's Rem. & Rem. Rights, sec. 549).

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Upon the principal question in the case it is contended for the respondents, the defendants below, that the sixty-day limitation mentioned in the lease refers to drilling operations or the drilling of a well, and that the lease requires the drilling of a well or drilling operations to be commenced within said period of sixty days, or within the period as extended by the alleged endorsements upon the lease if the petition should be held sufficient to show that the time was extended. As we do hold the petition sufficient in that respect as against the objection made upon the trial, the contention aforesaid is to be considered as referring to December 14, 1916, as the end or expiration of the period allowed for commencing the work, and respondents further contend that the facts alleged are insufficient to show the commencement of drilling operations or the drilling of a well.

It seems to be conceded, and even contended, by the plaintiffs, the appellants here, that the lease requires drilling to be commenced within the limited period on the leased lands or within a radius of one mile therefrom, and also that drilling operations shall be commenced within that period on the leased lands. But they contend that the facts alleged in the petition show the commencement of drilling operations on the leased lands within the limited period as extended, and that thereby both clauses,—the one requiring commencement of drilling on the leased lands or within one mile therefrom, and the other the commencement of drilling operations on the leased lands, were complied with. Referring to certain cases cited by the appellants and contending that they hold only that acts similar to those alleged in the petition are sufficient to constitute the commencement of "operations" under an oil lease, and conceding the correctness of the conclusion of the court in those cases, counsel for respondents maintain that there is a clear distinction between commencing "operations", and commencing "drilling operations" or "the drilling of a well".

We are inclined to doubt there being any reasonable distinction between commencing "operations" or commencing

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"drilling operations" under a provision in an oil lease for commencing work within a specified time, using either of those terms to describe the work to be commenced. Ordinarily, at least, a provision in such a lease for commencing operations would seem necessarily to refer to operations for drilling a well, or, in other words, drilling operations. But however that may be, we think it immaterial, so far as the present objection to the petition is concerned, whether the work required to be commenced within the limited time is the drilling of a well or drilling operations, for in either case the question whether the facts alleged are sufficient to show that the required work was commenced within said time is essentially one of fact rather than of law.

The question of whether acts similar to those here alleged are sufficient to constitute the commencement of drilling operations or the commencement of a well, as a question of fact for determination by the court or jury upon the evidence, has been decided differently in the few reported cases where the matter has been considered. In Henderson v. Ferrell, 183 Pa. St. 547, 38 Atl. 1018, the lease required that operations on the premises be commenced within thirty days. Nothing was done until the last day of the period allowed. On that day one of the lessees drove a stake near the center of the lot to indicate the location of the proposed well and the point where the lumber required in the work should be deposited. On the afternoon of that day an employee of the lessees, while unloading some lumber upon the lot in accordance with their instructions, was met by the lessor, who insisted that they had no right to put the lumber there, for the reason that the time allowed for commencing operations had expired in the forenoon of that day. The lessor's insistence that the lumber should not be deposited on the lot resulted in the unloading of the balance of it by the roadside, and he removed from the lot the lumber that had been unloaded there. The stake driven by one of the lessees as above stated had been taken up and carried away by the lessor or some member of his family before

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any lumber was unloaded upon the lot, and the lessees were not present when the stake or lumber was removed, or when their employee was forbidden to deposit the lumber where they had directed. The action was in ejectment by the lessees, and the case was submitted to a jury, resulting in a verdict and judgment for the plaintiffs. The court said:

"The lessees had a clear right to enter and commence operations upon the lot on March 5, and if they did so in good faith, and with a purpose to continue the work in accordance with the provisions of the lease, the resistance of the lessor to their occupancy of the lot furnished no warrant for a forfeiture of the lease. This was the view that was taken of the lessor's action by the learned court below, and which the lessor contests on this appeal. As the entry of the lessees upon the lot was before the time allowed for the commencement of operations under the lease had expired, it was *prima facie* at least a lawful entry, and the lessor's action was apparently an unlawful interference with it. It would seem, therefore, that the burden was on him to show conduct on their part which justified his action. But the lessees did not rest their suit for the possession of the lot on a bare presumption. They alleged, and introduced evidence to prove that their entry was made in good faith, and with a determination on their part to prosecute with due diligence the work they were authorized by the lease to do. The evidence submitted by them showed the obstructions in the way of an earlier commencement of operations, and the efforts they made to secure the materials, machinery and labor necessary to the proper performance of the work. It also showed that when they commenced operations on the lot they intended and were prepared to continue them, and that their failure to do so was caused by the refusal of the lessor to allow them to proceed. * * * Whether they commenced operations in good faith, and whether they intended to proceed with due diligence, were questions for the jury, and so was the question whether their failure to continue them was caused by the action of the lessor. These questions were submitted to the jury in a clear and im-

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partial charge, and the result was a verdict based on a finding of facts in accord with the lessee's contention. In other words, it is established by a verdict authorized by the evidence, that the lessees entered and commenced operations upon the lot in good faith, and that they were prevented from continuing them by the unlawful interference of their lessor."

The report of the case contains the charge of the trial court to the jury, which was approved by the Supreme Court, in which the commencement of operations required by the lease within the limited time is referred to as meaning the commencement of the drilling of a well, or, as if the lease required the commencement of a well on the premises within the specified time. Thus, after stating in the charge, that the commnecement of operations, or the commencement of anything, might be a very trivial act, it was said:

"It has to be, because everything, be it ever so great, is accomplished by doing little things one after the other, and the commencement of the drilling of a well may be made by doing an act insignificant in itself. The commencement of the buildings for the World's Exposition, perhaps, was the striking of a pick into the ground. But whether any given act is a commencement or not depends on circumstances. So in commencing operations in the drilling of a well, a very little thing may be the commencement, while acts more extended might not be. You must take all the circumstances into consideration, all the surroundings, to determine the character and effect of the act. Now, if the plaintiffs, Adams and Henderson, went upon this lot on March 5 (which was the last of the thirty days) and in good faith staked out a location for a well, showing where they wished to erect their derrick, and ordered lumber and had some of it put upon the lot, with the intention of proceeding with the work on the next day and continuously thereafter to the completion of a well, then locating the well on the ground and driving the stake and hauling the first load of lumber and delivering it upon the lot, in our opinion, would be a commencement. But the defendants claim here that what was done was not

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done in good faith; that it was, to use a slang expression, 'a bluff'; that it was not followed up; that they didn't do anything between that time and the time this suit was brought, nor between that time and the time the second lease was made; that they abandoned the prosecution of the work. Well now, if that is true, then it was not a commencement to drill a well,—it was simply putting a stake in the ground and putting some lumber there for the purpose of pretending to commence a well, and it would not be a compliance with the terms of the lease. It would be an act that is like and similar to commencing a well, but an act done in bad faith, and would not have the effect that it would have had if it had been followed up and the well completed."

While, therefore, the express requirement of the lease in that case was merely that "operations" shall be commenced within the time stated, it seems to have been considered by the court as requiring, within the limited time, the commencement of a well or the drilling of a well, so that the decision was not based upon the fact that the work to be commenced was described in the lease merely as "operations", instead of drilling operations or drilling a well.

In Fleming Oil & Gas Co. v. So. Penn. Oil Co., 37 W. Va. 645, an action to recover possession of leased premises, it appeared that the lease, dated February 22, 1889, required the lessees "to commence operations for a test well within one year from the date hereof, at some point in said district of Pawpaw, Marion county, and complete the same within eighteen months from said commencement", &c. That the lessees, in the fall of 1889, made preliminary surveys for the purpose of ascertaining the location of the oil belt with reference to a certain farm in said district, and on January 30, 1890, the point at which the test well was afterwards drilled was commenced. That a contract was made with one DeWitt in the fall of 1889, for the drilling of said well, by the terms of which the work was to be commenced on January 31, 1890; that in pursuance of said contract said DeWitt had the timbers for the derrick which were after-

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wards used by him in drilling said test well cut and hewn on said farm, between the 1st and the 6th of February, 1890; and in the latter part of January, 1890, said DeWitt contracted with one Barry to haul the machinery which was afterwards used in drilling said test well to said farm, which hauling was delayed for some time by reason of the impassable condition of the roads in that locality. That DeWitt got the material and machinery upon the selected locality, erected the derrick, and completed said well on August 21, 1890. That a second well was commenced on the leased premises on September 25, 1890, and was completed on January 6, 1891. That a second lease had been made by the lessor to another party on February 28, 1890, containing a covenant that the lessor was to be held harmless from the former lease "which expired February 22, 1890". The case was submitted to a jury upon the evidence and under instructions, and there was a verdict for the plaintiff, the lessee under the second lease, and the judgment upon that verdict was reversed by the Court of Appeals. The question before the Court of Appeals was, as stated in the opinion,—"Whether operations were commenced * * * for a test well within one year from the 22nd day of February, 1889, at some point in the district of Pawpaw, Marion County; and, if so, was the same completed within eighteen months from said commencement?" In determining the first question, the court said:

"Can it be said that, in order to commence operations for a test well, the drill must actually begin to penetrate the rock? I do not so understand the meaning of the expression construed in connection with the facts presented by the record. In many places, in order to sink a well, it is necessary that some sort of wooden or metallic casing be provided for the purpose of excluding the soil and clay which must be passed through before the rock is reached; and it would hardly be contended that the purchase and provision of the necessary material for such casing or cribbing was not an important step towards putting down the well. Webster defines the word 'operation' as 'an effect brought

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about in accordance with a definite plan'; and, in giving the interpretation ordinarily ascribed to the words 'to commence operations'—that is, applying to the words their common acceptation—I would understand the expression to mean the performance of some act which has a tendency to produce an intended result. * * * The terms of the covenant contained in said lease must be considered as having been complied with, no matter how slight may have been the commencement of any portion of the work which was a necessary and indispensable part of the work required in putting down the test well if commenced before the 22nd day of February, 1890. Procuring the derrick timbers is a work which must necessarily precede the manipulation of the auger and drill by means of an engine and other machinery, and the act of cutting and hewing the timbers for the purpose of constructing the derrick which was used in drilling said test-well can be regarded in no other light than that of an important and indispensable portion of the operations in drilling said well. This portion of the work was completed by the 6th day of February, 1890. The machinery was ordered previous to that time, and the well had been located. In these circumstances, our conclusion is that operations for the drilling of said test-well were commenced within the year commencing with the date of said lease, * * * ."

Another case in which this question was considered upon the evidence is Duffield v. Russell, 19 O. C. C. Rep. 266. The provision for commencing work in the lease involved in that case was: "The party of the second part further agrees to commence operations within sixty days from the date hereof, or in lieu thereof to pay the first party one dollar per acre per annum." It was shown by the evidence that on the last day of the sixty-day period the lessee staked out the well upon the leased lands in the presence of the lessor, who then contracted to sell to the lessee the timber for the purpose of building a drilling rig for the well. That the lessee had men there at the time to cut the timber, and part of it was cut that day. The lessee explained as an

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excuse for not doing any part of the work earlier, that it was almost impossible to obtain the necessary machinery, implements and lumber at the point of supply for the purpose of building a rig and drilling the well during the sixty days; that there was an extensive oil excitement in that vicinity making the demand for such necessary articles greater than the supply, and that he was also delayed by sickness. The court said that if, "irrespective of all this, he did 'commence operations' on the last day of the sixty days, that was all that he was bound or required to do, if he in good faith intended to continue the work and perform his contract with reasonable diligence. If the staking out of the well, making the contract for the timber for the rig and cutting a portion of the timber upon that day was a commencement of operations, then his lease is valid, as we think he intended, in good faith, to continue operations and perform his contract. We think there can be no question but that what he did upon that day was a commencement of operations within the meaning of this contract. On general principles we would say this, because the commencement of operations upon the land for the development of oil or gas, if done honestly and bona fidely, with the intention of developing, may consist of a trivial and comparatively insignificant matter when we take into consideration what is to be done. Any act, the performance of which has a tendency to produce the desired result, is a commencement of operations." The court further said:

"But further than that, it is clear from the evidence, in this case, that the lessor understood, and acted upon the assumption that Russell was in the rightful performance of his contract. He was there when the stake was driven and the well located. There was an ice house that would probably interfere with the construction of the rig at that point on his land, and he agreed to remove it, and instead of notifying Russell that the lease was forfeited, he entered into a contract with Russell that day for the sale of the timber for the rig, pointed out the timber in the woods, and knew part of it was cut and that his son had agreed to

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haul it for Russell; and until he was approached by Duffield and was offered $1,000.00 for a lease to him, he treated Russell as being properly in possession of the land; and afterwards when Hall told him he was going to buy an interest in the lease from Russell if everything was all right, he said the lease was valid and everything was satisfactory between them, and induced Hall to take an interest in the lease. Having himself thus acted, and thus acknowledged that Russell had performed his contract, and that the lease was valid, it would not become this court now to say otherwise."

The question was also considered upon the facts shown by the evidence in a Louisiana case (Hudspeth v. Producers' Oil Co., 134 La. 1014). As stated in the opinion of the court in that case, the contract required the lessee, within a stated time, "to commence operations on the tract by drilling, boring, or mining for oil." It was held, that selecting a location for a derrick, clearing the ground—about 12 acres, and sawing blocks on the ground for derricks, all done for the purpose of erecting derricks, was a sufficient commencement of the work to satisfy the condition of the lease, and that therefore the lessors had no legal right to declare the contract a nullity. But in a Texas case, Forney v. Ward, 25 Tex. Civ. App. 443, 62 S. W. 108, where the lessee was required by the contract to begin a well within four months, and he made no preparation to begin work until the day before the expiration of the prescribed time, and on that day hauled a load of lumber upon the premises intending to construct a derrick to be used in boring an oil or gas well, the jury found upon the evidence that what was done was not the beginning of a well, and the judgment upon the verdict was sustained. The appellate court said:

"The issue as to the meaning of the term used in the contract, considered in connection with the testimony in the case as to the general understanding among persons engaged in the business of boring oil wells as to when a well was begun, was submitted to the jury under proper instructions,

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and the jury found that a well was not begun, as that term was used in the contract, until the actual boring in the ground was commenced. This finding of the jury is supported by the great preponderance of the evidence, and is not assailed by the plaintiff."

And in a Kansas case, Henning v. Wichita Natural Gas Co., 100 Kans. 255, 164 Pac. 297, the lease containing a provision for a cancellation of the lease if the lessor should make a bona fide sale of the land before the lessee commences operations to drill thereon, it was held, that the driving of stakes to indicate the location of a well and of a boiler to run a drilling rig was not a commencement of operations to drill, within the meaning of the lease, "especially of such operations as will defeat a sale made before the defendant has put drilling material or machinery on the ground."

As we understand these cases, none of them declares, as a matter of law, that there is a distinction between commencing a well or the drilling of a well and commencing operations for drilling, with respect to the acts necessary or sufficient to constitute a commencement of the work, or that there is such a distinction in fact. But in the cases holding that the acts shown to have been done within the limited time constituted a commencement of operations, it was so held for the reason that said acts were a part of the necessary work in drilling or sinking a well or boring for oil. In the Texas case where, in a contest solely between the lessor and lessee, it was found that what was done was not the beginning of a well, the question was considered not alone upon evidence of the work done preparatory to actual drilling, but also upon testimony showing the general understanding among persons engaged in the business of boring oil wells as to when a well was begun, and the court said that the finding that a well was not begun was supported by the great preponderance of the evidence. And in the Kansas case, where a vendee of the lessor was a party, and the lease provided that it should be cancelled if the lessor should make a bona fide sale of the land before commencement of

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operations, it was held that the mere driving of stakes to indicate the location of a well was not the commencement of operations sufficient to defeat a sale made before the lessee had put drilling material or machinery on the ground.

And we think that it cannot properly be held as a matter of law that the alleged acts of the lessees in this case, if done in good faith and intending diligently to prosecute the work to completion, do not amount to the commencement of drilling operations or the drilling of a well, within the meaning of the provisions of the lease here in question limiting the time for commencing such work. In the Texas case, *supra,* the trial court refused an instruction to the effect that the hauling of lumber on the land for the purpose of beginning the construction of an oil well, and pushing it diligently to completion, was the beginning of the well as contemplated by the contract. And, holding that the refusal of such instruction was not error, the appellate court said:

"It certainly cannot be contended that the plain import of the words used in the contract is that any work done preparatory to the boring of the well would be the beginning of the well as contemplated by the contract, and the court could not so determine the meaning of the contract as a question of law."

In the Pennsylvania case of Henderson v. Ferrell, *supra,* it was directly held that whether operations were commenced in good faith, and whether the lessees intended to proceed with due diligence, were questions for the jury, and that upon the evidence relating to those matters the trial court would not have been justified in giving a peremptory instruction to find for the defendants, who claimed possession under a second lease.

And the question is presented in this case as one of law. An objection, upon the trial, to the introduction of any evidence, on the ground that the petition fails to state a cause of action is in the nature of a demurrer *ore tenus* (Cleveland v. Bateman (N. M.), 158 Pac. 648; Rothe v. Rothe, 31 Wis. 570; Jenks v. Allen, 151 Wis. 625; Stutsman County v. Mansfield, 5 Dak. 78, 37 N. W. 304; Belknap

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Glass Co. v. Kelleher, 72 Wash. 592, 130 Pac. 1123). A demurrer, as said in Gould on Pleading, "merely advances a legal proposition, viz, that the pleading, demurred to, is insufficient in law, to maintain the case shown by the adverse party." In Pease v. Phelps, 10 Conn. 62, it is said: "A demurrer presents only an issue of law to the court for consideration." And in Rice v. Rice, 14 Ore. 337, 10 Pac. 495: "Its only office is to raise issues of law upon the facts stated in the pleadings demurred to." (See also Miller v. Cross, 73 Conn. 538.) So upon objection to the introduction of any evidence on the ground that the complaint or petition is insufficient to state a cause of action, the question presented is, whether, in law, the pleading is sufficient (Kain v. Larkin, 141 N. Y. 144; Abbott v. Easton, 195 N. Y. 372; Chism v. Smith, 210 N. Y. 198; Shuber v. McDuffee (Okla.), 169 Pac. 642).

Under the rule above stated for construing the petition as against an objection to the introduction of any evidence, we think it sufficient as against such an objection to show the good faith of the plaintiffs, and that what is alleged to have been done by them within the limited period was with the intention to proceed diligently with the work of drilling a well to completion, and that such good faith and intention are fairly to be inferred from the averments. It is alleged not only that on December 12, 1916, a stake was set for the location of the first well on the premises, and that on the next day, also within the period of limitation, plaintiffs caused to be placed on said premises lumber for the repair and addition of a derrick for drilling purposes, but also that they had contracted for the tearing down from another location, about three miles away, of a derrick to be moved to and erected upon the leased lands; and further, that during the month of December and after the commencement of such operations there was a great amount of snow on the ground, making the hauling of material almost impossible, but that on or about the 24th and 25th of December, 1916, plaintiffs caused said derrick to be torn down and contracted to have the same hauled to said premises; that

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the "plaintiffs have been and are still ready, able and willing to keep and perform every obligation on their part to be kept and performed; and that before receiving the forfeiture notice from defendants the plaintiffs had expended $700 in prosecuting the drilling operations. Also that arrangements had been made with the defendants on December 12 to take care of the teamsters and the rig builders at their said premises.

In addition to the allegations as to what was done by the plaintiffs are averments to the effect that the defendants assented to or acquiesced therein, for it is alleged that the stake for the well was set by the plaintiffs together with F. A. Whitney, one of the defendants, and on the same day an arrangement was made with the defendants to care for the teamsters and rig builders. And it is expressly alleged that defendants knew that plaintiffs were expending time and money in prosecuting such drilling operations, and made no remonstrance or objection, but acquiesced in the same until sending the notice claiming a forfeiture.

We conclude, therefore, that the court erred in sustaining the objection to the introduction of any evidence, and for that reason the judgment must be reversed and the cause remanded for a new trial. It will be so ordered.

Reversed and remanded.

BURGESS, District Judge, concurs.

CHIEF JUSTICE BEARD and JUSTICE BLYDENBURGH being unable to sit in said cause, HON. JAMES H. BURGESS, Judge of the Fourth Judicial District, and HON. CHARLES E. WINTER, Judge of the Sixth Judicial District, were called in to sit in their stead. JUDGE WINTER, having resigned as District Judge after the submission of the cause, did not participate in the decision.

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MURPHY v. W. & W. LIVESTOCK COMPANY.

(No. 974; Decided February 3, 1920; 187 Pac. 187.)
(Rehearing Denied May 13, 1920; 189 Pac. 857.)

APPEAL AND ERROR—WAIVER OF ERROR BY FAILURE TO MENTION IN MOTION FOR NEW TRIAL—NEW TRIAL—BROKERS—BROKER'S RIGHT TO COMMISSION—VERDICT ON CONFLICTING EVIDENCE WILL NOT BE DISTURBED ON APPEAL—EVIDENCE—TRIAL—INSTRUCTIONS.

1. Grounds of error assigned in the petition in error but not specifically mentioned in the motion for a new trial, are waived and cannot be considered in the Supreme Court.
2. Where, pursuant to an ordinary brokerage contract, the broker has procured a purchaser, ready, willing, and able to buy at the price named, and an enforceable contract is entered into between the owner and the purchaser found by the broker, the broker's commission is at once due and payable, though the contract is never carried out by the final payment of the purchase money. But in an action to recover such commission plaintiff is required to sustain the contract pleaded by him, by a preponderance of the evidence.
3. An appellate court should not reverse a verdict rendered on conflicting evidence.
4. In an action by a broker for commissions for finding a purchaser for ranch lands and livestock, where there was evidence tending to show that plaintiff did not think he was entitled to be paid commissions until defendant had received all of the purchase price, a verdict for the defendant will not be disturbed.
5. In an action by a broker for commissions for procuring a purchaser for lands and live stock, an instruction presenting plaintiff's theory of the case as well as the defendant's is not violative of plaintiff's rights.

ON PETITION FOR REHEARING.

6. Where broker's commission is by contract made dependent upon certain conditions or contingencies, as upon the consummation of sale, or payment of the purchase price or a specified part thereof, or a net price to the owner, these stipulations will govern, and a fulfillment of the prescribed conditions is generally essential to the right of compensation.
7. Where broker's proposal was that he should name $35,000 as price for a ranch, and "after getting $30,000 for you for the ranch, the $5,000 will be my commission", the extra $5,000, that particular part of the total price to be

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named, was to constitute the commission, and broker was entitled to no compensation where purchaser paid first installment of $10,000 and then defaulted.

8. Where a broker's contract of employment provides for net price to the owner or for a commission out of or to consist of the excess above stated price, such contract is generally construed as requiring, as a condition to the right to the agreed commission, an actual or completed sale for an amount exceeding such net or selling price, unless the same has been prevented by the fault of the owner.

9. An answer, in an action by a broker for commission for furnishing purchaser, which denied each and every allegation of the petition not specifically admitted, and alleged that it was agreed that, if plaintiff produced a purchaser who would "purchase" and "pay" for the property at a certain price, then the defendant would pay plaintiff the sum of $5,000, "the difference between the price for which plaintiff was willing to sell and the price plaintiff represented the purchaser produced by him would pay therefor," held, to allege a special contract, and not to admit the contract of employment alleged in the petition, which was based on the general rule that a broker is entitled to compensation when he furnishes a buyer ready, willing, and able to perform.

ERROR to the District Court, Park County; HON. P. W. METZ, JUDGE.

Action by W. W. Murphy against the W. & W. Live Stock Company to recover a broker's commission for negotiating a sale of property. There was a verdict and judgment for defendant and plaintiff brings error.

R. B. Landfair, for plaintiff in error.

The action was for a recovery of a broker's commission for finding a purchaser for lands and livestock; the vendor is entitled to reasonable time to investigate the financial standing of an intended purchaser (Smith v. Penn, 151 Ill. 155, 9 C. J. 600); the amount of plaintiff's commission and the fact that he found a purchaser was undisputed. Having found a purchaser, ready and willing to buy, plaintiff's commission was payable at once (Oudluhan v. Baldwin, 11 Cal. 648, 35 Pac. 310; Pape v. Wright, 116 Ind. 502, 19 N. E. 459; McFarland v. Lillard, 2 Ind. App. 160, 28

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N. E. 229; Teeford v. Brinkerhoff, 45 Ill. App. 586; Gelatt v. Ridge, 117 Mo. 553, 23 S. W. 882; Cheatham v. Yarborough, 90 Tenn. 77, 15 S. W. 1076; Lunney v. Healey, 44 L. R. A. 593); where vendor has made a contract for sale to a person produced by the broker, the solvency and ability of the purchaser to perform the contract will be presumed (Goss v. Brown, 31 Minn. 484; Grosse v. Cooley, 32 Minn. 188; Hart v. Hoffman, 44 How. Pr. 168; Crewier v. Stephens, 40 Minn. 288; Cook v. Kronmeke, 4 Daly, 468; Nichols v. Jones, 23 Nebr. 813; Butler v. Kennard, 23 Nebr. 357; Potvin v. Currin, 13 Nebr. 303; Blakeslee v. Erwin, 40 Neb. 134; Holden v. Stark, 159 Mass. 503; Heaton v. Edwards, 90 Mich. 500, 9 C. J. 596; Wray v. Carpenter, 16 Colo. 271, 37 Pac. 248), and failure of the purchaser to carry out the contract will not deprive the broker of his commissions (Lunney v. Healey, 44 L. R. A. 593; Wray v. Carpenter, 16 Colo. 271, 27 Pac. 248); the broker is not an insurer of the purchaser's ability (Payne v. Ponder, 139 Ga. 283, 77 S. E. 32); where the vendor accepts a person presented as a purchaser and enters into an enforceable contract of sale with him, the broker is entitled to his commission (Scully v. Williamson (Okla.), 108 Pac. 395, 27 L. R. A. 1089); this is especially true if the vendor retains purchase money paid, and does not rescind (Meyer v. Land Co., 126 Minn. 409, 148 N. W. 452; Mayhew v. Brislen, 108 Pac. 253); where a principal fixes a net price, the broker to receive all he gets over that sum, he is entitled to a payment of commission on a sale of all over and above the amount fixed as net (Church v. Dunham, 14 Ida. 776, 96 Pac. 203), and he is entitled to payment out of the first payment (Young v. Ruhwedel, 119 Mo. App. 231, 95 S. W. 228; Yoder v. Randol, 83 Pac. 537); where no terms of sale are mentioned, and seller sells property, his agent is entitled to commission (Frost v. Houx, 15 Wyo. 353); the court should have rendered judgment for plaintiff on his motion (Calkins v. Mining Co., 25 Wyo. 409); instruction No. 2 is erroneous. The court erred in refusing instructions offered by plaintiff designated "A" to "L", inclusive;

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the court fairly instructed as to plaintiff's theory, but not wholly as to defendant's theory of the case and this was error; plaintiff was entitled to instructions defining the whole law as to brokers, applicable to the facts of the case.

C. H. Harkins and *H. C. Brome,* for defendant in error.

The evidence clearly disclosed a misunderstanding as to the terms of the agreement between plaintiff and defendant and the conduct of plaintiff indicated that he did not believe he was entitled to commissions until defendant had received the full sum of $30,000, being the net price fixed for the ranch; the acts of the parties amounted to a construction placed upon the agreement by themselves and such construction should be adopted by the court (9 Cyc. 589; Hopkins v. Settles, 149 Pac. 890); under a contract by which a broker's commission is limited to the excess of the purchase price over a net price to the owner, there is no liability for commission where the purchaser procured is unable to perform the contract of purchase (Martinson v. Hensler, 157 N. W. 714; Robinson v. Ins. Co. 155 Pac. 202; Ford v. Brown, 120 Cal. 551, 52 Pac. 817; Fountain v. Pearson, 201 Fed. 324); where the seller has no acquaintance with the proposed purchaser and the broker presents him for the purpose of making an executive contract there is an implied warranty that he has ability to make the purchase (Butler v. Baker, 17 R. I. 582; Iselin v. Griffith, 62 Iowa 668); the record does not properly present any question with reference to the giving or refusing of instructions for review by this court; a general assignment relating to a number of special instructions must be overruled if any one was properly given or refused (Dickenson v. State, 18 Wyo. 440); there was evidence to sustain the verdict and the judgment should be sustained.

BLYDENBURGH, JUSTICE.

The plaintiff in error, Murphy, brought this suit in the court below to recover from the defendant in error, W. & W. Live Stock Company, a corporation, five thousand five hundred and fifty dollars alleged to be due as commissions for

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finding a purchaser for certain ranch lands, leases and sheep. The case was tried to a jury, which returned a verdict for the defendant, upon which judgment was rendered, and plaintiff brings this proceeding in error.

The plaintiff's amended petition contains two causes of action, in the first alleging "that ever since on or about the 15th day of October, 1918, there has been due him from the defendant the sum of fiive thousand dollars ($5,000.00) with interest thereon at 8% on a contract entered into between the plaintiff and defendant whereby on or about the 23rd day of September, 1918, it was agreed by the defendant with the plaintiff that if the plaintiff would find a purchaser for certain ranch lands of defendant's being about 560 acres near Big Trails, Wyoming, together with the leases on about 2,000 acres of land in the same vicinity thereof, at the price of thirty-five thousand dollars ($35,000), then the defendant would pay the plaintiff the sum of five thousand dollars ($5,000.00). That the plaintiff produced a purchaser ready, willing and able to pay the price fixed and on or about the 15th day of October, 1918, terms of sale were agreed upon between defendant and said purchaser, one Fred Eberhard, and an enforceable contract executed between them for the sale of the said land and leases and under the terms of said contract the defendant received and retained the sum of ten thousand dollars cash at the time of the execution thereof from said purchaser, Eberhard; when, at which time, the sum of five thousand dollars became due and payable to plaintiff from defendant; yet defendant, though requested, has not paid any part thereof."

The second cause of action is in the same general language except it is alleged that the plaintiff was to find a purchaser for certain sheep at $17 per head; that he did produce a purchaser for 2,200 head of sheep ready, willing and able to purchase the same and that defendant agreed with plaintiff that 25c per head was a reasonable commission therefor. The defendant answered the first cause of action first by a general denial and then after admitting its corporate exist-

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ence alleged in substance that the plaintiff stated to defendant that he had a purchaser for defendant's ranch lands near Big Trails, Wyoming, and for a band of breeding ewes kept on or near said ranch and inquired what commission defendant would be willing to pay plaintiff if said purchaser should be induced by plaintiff to purchase and pay for said property. That defendant advised plaintiff that it was willing to sell said ranch property for $30,000 and said sheep for $17.00 per head, and that defendant would not pay any commission at the price named and if plaintiff procured a purchaser at the price named he must obtain any commissions for his services from such purchaser. That thereupon plaintiff represented he had a purchaser who would pay $35,000 for the ranch, $17.00 per head for the sheep, and thereupon defendant agreed with plaintiff if plaintiff produced a purchaser who would purchase and pay for the property at the prices named then the plaintiff should receive the sum of $5,000, the difference between the price for which plaintiff was willing to sell and the price plaintiff represented the purchaser produced by him would pay therefor. Then it is alleged the plaintiff represented that the proposed purchaser was one Fred Eberhard, and that he was financially responsible and possessed money and credit sufficient to enable him to purchase said property and pay defendant the purchase price thereof. That on Oct. 15, 1918, a contract was entered into between the said Fred Eberhard and the defendant for the purchase of said ranch, sheep and certain personal property on said ranch, by the terms of which Eberhard was to pay $35,000 for the ranch, $17.00 per head for the sheep and $5,500 for the other personal property, $10,000 to be paid, and was paid, at the signing of the agreement, and the balance to be paid and possession to be given on or before Dec. 1, 1918. That at the time of entering into the contract of sale the defendant had no knowledge of the financial responsibility of Eberhard other than the representations of plaintiff and that it relied upon the information furnished by plaintiff in that

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respect. That said statements of plaintiff respecting Eberhard's financial responsibility were false and untrue and he was not financially responsible, was not able and did not comply with the contract and pay the balance of the purchase money or take the property. That defendant complied in every respect with its contract and was able and willing to convey and deliver the said property as required by the contract on the payment of the purchase price. That by reason of the failure of Eberhard to complete the purchase by payment of the balance of the purchase price plaintiff failed to earn or be entitled to any commission. Then follows a general denial of the second cause of action.

The plaintiff filed a reply which reiterated the claims of the petition and denied that he made any false and untrue statements concerning the financial responsibility and worth of Eberhard and denied that Eberhard was not financially able to comply with the contract of purchase at the time he entered into said contract with the defendant; alleges that defendant had ample time and opportunity to ascertain Eberhard's financial responsibility and worth before entering into the contract with him and defendant accepted him as the purchaser found by plaintiff without any question as to his financial responsibility and entered into the contract at which time plaintiff's commission became due and payable to plaintiff from defendant and plaintiff was estopped from claiming there is nothing due plaintiff by reason of the failure of Eberhard to complete the purchase by payment of the balance of the purchase price.

The petition in error sets out seven different specifications of error, to-wit:

"1. That said court erred in ruling out the evidence offered by the said W. W. Murphy on the trial of said action."

"2. That said court erred in over-ruling the motion of said W. W. Murphy for a directed verdict, at the close of the trial, under his first cause of action in the amended petition."

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"3. That said court erred in the instructions given to the jury on the trial of said action, viz: Instructions Nos. 2 and 3, as appears in the record."

"4. That said court erred in refusing to give the instructions which plaintiff in error prayed the court to give, viz: Instructions 'A' to 'L', inclusive, as appears in the record."

"5. That said court erred in over-ruling the motion of plaintiff for a new trial."

"6. That judgment was given for said defendant, when it ought to have been given for the said plaintiff, according to the laws of the land."

"7. And there are other errors, prejudicial to the plaintiff in error, manifest upon the face of the record."

The motion for a new trial contained five different grounds as follows:

"1st. The verdict is not sustained by sufficient evidence and is contrary to law."

"2nd. The court erred in its instructions to the jury each and every one of which was excepted to, at the time, by the plaintiff."

"3rd. The court erred in refusing the instructions asked by the plaintiff, to which refusal the plaintiff, at the time, excepted."

"4th. For the several errors of law occurring at the trial, and to the commission of each and every of which the plaintiff, at the time, excepted."

"5th. And for other manifest errors apparent upon the face of the record."

It is evident that the first and second grounds of error mentioned in the petition in error not being specifically mentioned in the motion for a new trial are waived and cannot be considered here, and while the motion for a new trial alleges error in the giving of all the instructions given to the jury the petition in error claims error only in the giving of instructions 2 and 3, and the record shows that these two were the only ones excepted to by plaintiff, which we will later consider.

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The principal contention of the plaintiff is that when a broker has produced a purchaser for the property in question who is able, ready and willing to purchase at the price named and an enforceable contract is entered into between the owner and the purchaser found by the broker that the broker's commissions become at once due and payable, notwithstanding the fact that the contract of sale is never carried out by the final payment of the purchase money. This is the law governing ordinary brokerage contracts such as is pleaded by plaintiff herein, and was so held by this court in the case of Frost v. Houx, et al., 15 Wyo. 353, 89 Pac. 568. It may well be admitted that had plaintiff proved the contract plead in his petition he should have obtained the verdict and judgment, but it devolved upon plaintiff to sustain the contract plead by him by a preponderance of the evidence and the court so instructed the jury.

Whatever agreement or understanding that was had between these parties relative to the sale of the ranch and sheep was oral and consisted of conversations had over the long distance telephone and not heard by anyone else as far as disclosed by the record other than C. C. Worland, secretary and treasurer of the defendant corporation, and W. W. Murphy, the plaintiff, who were the parties to the conversation. Each of these parties testified as to their recollection of what was said as follows:

The plaintiff testified:

"Q. Now, Mr. Murphy, you may state if on or about the 23rd day of September, 1918, you had a conversation with any of the officers of the defendant in reference to selling some ranch lands and stock?

A. I did.

Q. And with whom did you have that conversation?

A. C. C. Worland.

Q. And that is the gentleman right here (indicating) C. C. Worland?

A. Yes, sir.

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Q. Now, did you at any time have an agreement with the defendant to sell their ranch lands and some stock for them, if any? (Objection.)

Q. Did you have an agreement at any time with the defendant prior—shortly prior to October 15th, 1918, whereby you was to sell the ranch lands and certain sheep for the defendant?

A. I did.

Q. Now, you tell the jury what that agreement was. (Objection.)

By the Court: Yes, he may state what was said between the two parties.

Q. You may state what that agreement was by stating what was said between you and Mr. Worland and when it was.

A. I called Mr. Worland over the phone and talked with him previous to this time about selling his ranch property and sheep and on this day I called him up and asked him if he still wanted to sell them. He said he did. I asked him the price of the ranch property—first, I asked him what it consisted of. He said about—around 6,000 acres of deeded lands and about 2,000 acres of leased lands—

Q. About how many acres of deeded land?

A. Around 2,000 acres of deeded land—of leased land, I should say.

Q. 6,000——

A. 600 of deeded land and about 2,000 of leased land. I asked him the price of the property. He told me $30,000, and then I asked him how many sheep he had and I don't just remember, but I think he said around 5,500, and I asked him the price of the sheep. He said $17.00 a head, and I asked him then if he would pay a commission out of the $30,000. He said, 'No.' I said, 'Well, I have a man, one Mr. Eberhard, here with me that will pay $35,000 for the ranch property and will take some sheep', and I said to him, I said, 'How will that be, to put the ranch property at $35,000 and you pay us $5,000, and whatever is right for

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the sheep?' He said, 'Alright, it was alright, bring him over.'

Q. Was this conversation held over the phone?

A. Yes, sir.

Q. And where was you when you was talking to Mr. Worland?

A. I was at the Irma Hotel.

Q. Irma Hotel in Cody?

A. Yes, sir.

Q. And where was he?

A. He was at Worland."

On cross-examination:

"Q. Now, when you talked to him here you asked him if he wanted to sell the ranch and sheep?

A. Yes, sir.

Q. And he said he did?

A. Yes, sir.

Q. You asked him what his price was for the ranch?

A. Yes, sir.

Q. And he said $30,000?

A. Yes, sir.

Q. You asked him what his price was for the sheep and he told you $17?

A. Yes, sir.

Q. Did he tell on that conversation how many sheep he had?

A. I think he said around 5,500.

Q. And you think he said that at that conversation?

A. Yes, sir.

Q. On the 23rd of September. Now, you asked him what commission he would pay and he told you he wouldn't pay any, didn't he?

A. Yes, sir.

Q. You suggested to him, didn't you, that you could—had a purchaser that would give $35,000 for the ranch, or that you could price the ranch at $35,000?

A. Yes, sir.

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Q. And that you would be willing to take the $5,000 as commission?

A. No, sir.

Q. You didn't say that?

A. No, sir.

Q. What did you say to do with the $5,000?

A. As I stated before, I told him price the ranch at $35,000, he to pay us $5,000 and what was right for the sheep.

Q. Well, now, did he tell you before that that he wouldn't sell the ranch unless he sold the sheep?

A. He said he wanted to sell the whole outfit."

C. C. Worland testified in regard thereto:

"Q. Now, in September, where were you when you had the first talk?

A. We were shipping sheep at Arminto and Mr. Murphy called me up there.

Q. Called you up on the phone?

A. Yes, sir.

Q. And did you hear what he said?

A. Yes sir.

Q. And were you able to communicate with him?

A. I was.

Q. Now, can you tell the jury just what he said to you and what you said to him at that time with respect to the sale of the ranch or the sheep?

A. Well, Mr. Murphy called me up and said he heard that we were offering the Big Trails ranch and the sheep for sale and I told him we was, and he said he had a buyer and he wanted to know what we wanted for the ranch and sheep and I told him we wanted $30,000 for the ranch and $17.00 a head for the sheep and he said, 'How about commissions?' Well, I said, 'That is the price that we have got to have; that is the lowest possible price we can take for this stuff.' Well, he said—I said, 'You will have to figure out the commission some other way.' He said, 'How about me putting a price of $35,000 on the ranch and after getting $30,000 for you for the ranch, the $5,000 will be my com-

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mission' and I said that would be agreeable with me, so that was about the size of the—that was about the conversation at that time.

"Q. When you had the original talk with him at Arminto, was that the time you told him he could have as commission on the deal all he got for the ranch over $30,000?

A. That is the only conversation I ever had with him regarding commissions.

Q. And did he ask you what commission you would give him for selling the sheep at $17.00 and the ranch at $30,000 in the first place?

A. Well, preliminary to the $5,000 proposition, he said, 'Our usual commission is 5 per cent and 25 cents a head for the sheep,' but in the conversation afterwards it developed that if he could get $35,000 for the ranch he would take $5,000 for his commission.

Q. I thought I understood you to say that you told him that $30,000 for the ranch and $17.00 for the sheep must be net to you? (Objection.)

A. Yes, that is what I told him, that is the price we had to have net.

Q. And you told him that after he had suggested to you that the ordinary price was 5 per cent commission and 25 cents a head for selling sheep?

A. That was during the conversation he stated the usual commissions was that.

Q. It was all during the same conversation?

A. Yes, but the $5,000 commission I understood to be the final—that was after the other talk.

Q. When was this commission to be paid?

A. When we had received $30,000."

And on cross-examination as follows:

"Q. Which one of the conversations was it where the agreement as to the commissions were settled between you and Mr. Murphy?

A. That is the conversation when I was at Arminto.

Q. And where was Mr. Murphy?

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A. Well, I don't know where he was at. I don't think I asked him over the phone. I thought he was at Basin, but I didn't ask him at the time.

Q. I will ask you if you didn't have a conversation between you and Mr. Murphy when he was at Basin and you was at Arminto on the 16th day of September, 1918?

A. It was some time in September. I don't know the date.

Q. And I will ask you afterwards if there wasn't another conversation between you and Mr. Murphy respecting the commission when he was at Cody and you was at Worland on September 23rd, 1918?

A. We only had one conversation where the commission entered and that was when I was at Arminto, a phone conversation."

It will be seen from the above quotations that although in some things there was little conflict in the evidence in regard to the main question what was the agreement as to commissions there was a wide misunderstanding between the parties. The jury accepted defendant's version as to this, and as the defendant did not receive the $30,000 or $17.00 per head for the sheep it was relieved of any obligation to pay plaintiff any commission. This was a matter peculiarly within the province of the jury, and we, under the well known and often stated rule "that an appellate court should not reverse a verdict rendered when the evidence is conflicting" have no right to disturb the verdict. Further, we think the jury acted rightly under the evidence, the plaintiff failed to prove the contract plead by a preponderance of the evidence and in addition several significant facts appear in the record which tend to show that the plaintiff did not think he was entitled to be paid his commissions until the defendant had received all the purchase price. At the time the written contract between Eberhard and the defendant was executed at the ranch the plaintiff was present and witnessed the contract and had in his possession the $10,000 for the cash payment and after the signing he took possession of the contract and kept the check and brought

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both to Worland and delivered them to Ira Jones, assistant secretary and bookkeeper of the defendant company; but although, if his allegations and contentions are correct, his commissions were then due and payable from the defendant, he delivered the check without any demand or intimation that he should be paid; and having occasion to write Ira Jones on Oct. 28, more than a month before the time for the final payment as fixed by the contract of sale, in regard to the numbers of the land and water rights and abstract of title to complete a loan he was endeavoring to secure for Eberhard so he could complete the payment of the purchase price, he requested that Jones urge Eberhard to speedily make full payment so he could receive his money, as contained in the following excerpt from that letter:

"When Mr. Eberhard left here for the ranch last Wednesday everything was O. K. and he expected to pay more on this deal in a week or so or just as soon as he could get things straightened out at the ranch and get back down to Worland, so, I think it well that he cleans the most of this up at the next payment, as he can just as well as not, and I need some money soon as well as Mr. Worland will want the most of this settled soon, so, urge Mr. Eberhard if he comes in to make payments as he stated to pay all he can now and then finish up in a short time."

As to the second cause of action, from all the evidence in regard thereto it does not appear that it was ever agreed or contemplated that any commission was to be paid if the sheep were sold for $17.00 per head, except as the extra $5,000, if paid for the lands over defendant's price, might be intended to include commissions on the sale of the sheep and when plaintiff made demand on defendant by sending an order to Worland on the day before the final payment was due by Eberhard according to the terms of the written contract, it is significant that the order was for $5,000 only and did not include the amount claimed in the second cause of action as commission on the sheep.

We have carefully examined the instructions given by the court and those asked for by plaintiff and refused by the

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trial court, and do not think any reversible error was committed. The jury seems to have been fully instructed as to all questions of law necessary under the pleadings and evidence in the case. All of the principles contained in the requests that were refused that were applicable to the case as made were embodied in other instructions given by the court in different form. The instruction given that is most earnestly objected to reads as follows:

"You are further instructed that it is the duty of the jury in this case to first determine under the evidence what the contract for commission, if any, was as between the plaintiff and defendant herein. If you find that the agreement entered into between the plaintiff and defendant was that the defendant instructed the plaintiff that he would sell his ranch property for $30,000 net and refused to pay any commission but instructed the plaintiff that he must get his commission from some other source, then I instruct you that the plaintiff would not be a broker under the ordinary term but that he would be acting under a special contract, and would not be entitled to and could not collect his commission claimed under his first cause of action until the defendant had been paid the $30,000 in full for his property; but if you find that the plaintiff and defendant entered into an agreement whereby the defendant agreed to pay the plaintiff $5,000 if he found a purchaser for the ranch lands at $35,000 and that there was no agreement as to the net amount due the defendant and no agreement as to the plaintiff receiving his commission other than from the defendant, then I charge you that the law as hereinafter defined pertaining to brokers applies."

The case of Hopkins v. Settles (Okla.), 149 Pac. 890, is one in most respects like the case at bar. In that case a similar instruction was objected to and the Supreme Court of Oklahoma said, in regard thereto:

"In the light of the contentions of the parties and the evidence introduced in relation thereto, this instruction was substantially correct; in fact, while many instructions were given, fairly covering plaintiff's theory of the case, this is

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the one special instruction that submitted to the jury the defendant's theory. If defendant's theory was correct, he was under no obligation to pay plaintiff the amount claimed, and this instruction merely tells the jury so."

We may well adopt this language as our own in this case, although this instruction also contains plaintiff's theory as well as defendant's, which the instruction in the Oklahoma case did not. Finding no reversible error in the record, the judgment of the lower court will be affirmed.

Affirmed.

BEARD, C. J., and POTTER, J., concur.

ON PETITION FOR REHEARING

POTTER, JUSTICE.

In this action to recover money alleged to be due as a broker's commission, the judgment of the District Court in favor of the defendant, upon the verdict of a jury, was affirmed, and the case is again before us upon a petition for rehearing filed by the plaintiff in error, who was also plaintiff below.

The plaintiff's right to recover was shown to depend primarily upon the effect of a conversation by telephone between him and C. C. Worland, the secretary and treasurer of the defendant company, as constituting the only agreement between the parties for the services and compensation of the plaintiff, in connection with the sale of the property in question. Each of said parties to that conversation testified concerning it, and their testimony in that respect is set out in the former opinion. (See 187 Pac. 189-190.) They do not exactly agree in their testimony as to what was said with reference to the payment of a commission, but they do agree that the said Worland stated that the company's price for the property—ranch property and sheep—was $30,000 for the ranch property and $17 per head for the sheep, and that they would not pay any commission out of the $30,000. And Worland testified that he told the plaintiff they would not pay any commission out of the stated price for either the ranch or the sheep. The con-

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flict in their testimony relates to what was said immediately after that as a part of the same conversation.

The plaintiff testified that he then told Worland that he had a man with him, one Eberhard, who would pay $35,000 for the ranch property and would take some sheep, and asked him how it would be to put the ranch property at $35,000 and "you pay us $5,000 and whatever is right for the sheep", and that Worland said: "All right; it was all right; bring him over." Worland's version of that part of the conversation, given in his testimony, was, that the plaintiff said: "How about me putting a price of $35,000 on the ranch, and, after getting $30,000 for you for the ranch, the $5,000 will be my commission," and that he, Worland, replied by saying that that would be agreeable with him. And he further testified that he told the plaintiff in said conversation that the $30,000 for the ranch, and $17 for the sheep must be net,—"that is what I told him; that is the price we had to have net."

The prospective purchaser named in the conversation and Worland, representing the defendant, having been brought together by the plaintiff, and a contract entered into by them for the sale of the ranch property and some sheep, the plaintiff claimed to be entitled to a commission of $5,000 for the sale of the ranch property and a reasonable amount for the sale of the sheep, basing the claim upon the principles applicable to ordinary brokerage contracts, notwithstanding that, without the defendant's fault, the sale was not completed and the only amount paid upon the agreed price was the advance cash payment of $10,000 at the time of making the contract. And the same point is again urged in support of the petition for rehearing, that is to say, that the plaintiff became entitled to his broker's commission when the purchaser found by him and the owner entered into an enforceable contract for the sale of the property at the price named. That was conceded, in the former opinion, to be the law governing an ordinary brokerage contract such as pleaded by the plaintiff in this case.

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But the difficulty with the proposition in this case is that the defendant, by its answer, denied the contract pleaded in the petition and alleged a different contract for the commission—a special contract—as shown in the former opinion by stating the substance of the averments of the answer to the first cause of action, to the effect: That plaintiff was advised by defendant that the latter was willing to sell the ranch property for $30,000, the sheep for $17 per head, and certain other personal property for $5,500, but would not pay any commission for a sale at those prices, and that any commission for plaintiff upon a sale to a purchaser procured by him at those prices would have to be obtained by him entirely from the purchaser; and that plaintiff having then represented that he had a purchaser who would pay $35,000 for the ranch and $17 per head for the sheep, and $5,500 for the other property, it was agreed that if the plaintiff would procure a purchaser for said property who would purchase and pay for the same at the prices last named, "defendant would pay plaintiff the sum of $5,000, being the difference between the price for which defendant was willing to sell and the price which plaintiff represented the purchaser to be procured by him would pay therefor." And defendant's evidence introduced to show what the contract was not only contradicts the plaintiff's evidence to prove the contract alleged by him, in some material respects, but it supports the averments of the answer as to the agreement or understanding concerning the payment of a commission. And the jury, by returning a verdict for the defendant, must have found in view of the instructions of the court, that the agreement or understanding was as stated in the testimony of Mr. Worland.

The general rule of brokerage contracts that the broker is entitled to his commission when a purchaser procured by him and the employer have entered into a valid, binding, and enforceable contract of sale, whether the contract is afterwards carried into effect and the sale actually consummated or not, cannot, of course, govern where there is a provision to the contrary in the contract of employment. It is a rule

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of evidence, and does not mean that in all cases a broker must show that his efforts have resulted in a valid and enforfeable contract of sale to entitle him to his commission. But the fact that such a contract has been entered into is held to be presumptive evidence of the performance of the broker's ordinary duty to produce a purchaser ready, willing, and able to buy at the price, and upon the terms, if any, proposed, or an acceptance of the purchaser by the owner waiving the latter's right to object on the ground that the purchaser was not able to complete the purchase or pay the agreed purchase price (2 Mecham on Agency, 2nd Ed., Secs. 2440, 2441). The rule is, therefore, without controlling application when the commission is made dependent upon other conditions than the mere finding of a customer ready, able and willing to buy, at least where the failure of such conditions is not the fault of the owner or the result of a situation for which he is responsible.

And the principle is as well settled as the general rule aforesaid that where, by the contract of employment, the commission is made dependent upon certain conditions or contingencies, as upon the actual consummation of a sale, or the full payment of the purchase money, or a specified part thereof, such as an agreed first payment, or a net price to the owner, these stipulations will govern, and a fulfillment or performance of the prescribed conditions is generally essential to the right to compensation (2 Mecham on Agency, 2nd Ed., Sec. 2427; 4 R. C. L. 310, 312; 9 C. J. 581, 587, 632; 23 Ency. L., 2nd Ed., 911, 918, 919, 923; Lindley v. Fay, 119 Cal. 239, 51 Pac. 333; Robertson v. Vasey, 125 Ia. 526; Cremer v. Miller, 56 Minn. 52; Van Norman v. Fitchette, 100 Minn. 145, 110 N. W. 851; Antisdel v. Canfield, 119 Mich. 229, 77 N. W. 944; Columbia Realty Co. v. Alameda Land Co. (Ore.), 168 Pac. 64; Orr v. Schwager & Nettleton, 74 Wash. 631, 134 Pac. 501; Lyle v. Univ. L. & Inv. Co. (Tex. Civ. App.), 30 S. W. 723; Burnett v. Edling, 19 Tex. Civ. App. 711; Larson v. Burroughs, 131 App. Div. N. Y. 877; Pratt v. Irwin, Mo. App. 189 S. W. 398; Murray v. Rickard, 103 Va. 132; Cies v.

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Gale, 168 Mo. App. 282; Laird v. Schmidt, 80 O. St. 108, and see note to Moore v. Irwin, 20 L. R. A. (N. S.) 1172-1174).

Thus, after stating the contention of plaintiff in Columbia Realty Co. v. Alameda Land Co., *supra,* that when it produced a purchaser with whom defendant made a binding contract of sale, it earned its commission and that its right thereto was not lost by the default of the purchaser or the cancellation of the contract, the court said, "This is the general rule (Stewart v. Will, 65 Ore. 138, 140, 141, 131 Pac. 1027). But it is subject to modification by the parties. The material question here is whether the contract on which plaintiff relies contains a promise to pay commission at all events or only out of a specified fund, to-wit, the amounts paid by the purchasers." And in Lindley v. Fay, *supra,* the court said that the evidence "tends to show an agreement to pay commissions out of the first money received, and no money has ever been received. Under such a contract, the broker is not entitled to compensation when he finds a purchaser ready, willing, and able to purchase on the prescribed terms. There must be a sale and a first payment to entitle him to recover. It is so nominated in the bond." So in Pratt v. Irwin, *supra,* the court said respecting the general rule aforesaid as to the effect of a written binding contract and the refusal of the purchaser to perform the same: "But that rule does not forbid the parties from stipulating that the commission shall not accrue until the sale or exchange be consummated. The conversation between the parties in which they agreed upon the amount of the commission, as detailed by defendant, shows that both parties understood the contract of employment, which was oral, to mean that plaintiff would not be entitled to his commission until the exchange of farms was actually made."

In Van Norman v. Fitchette, *supra,* the court said: "This is not the ordinary contract by which the broker agrees to furnish a purchaser ready, willing, and able to buy the property upon stated terms. * * * Here the parties entered into a different kind of a contract, expressly providing that

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the $2,500 commission should not be earned or paid until the $12,500 should be actually paid on May 30, and the mortgage for $10,000 executed and delivered. * * * The commission was not earned until the company (the purchaser) performed what it agreed to do." And it was said by the court in Antisdel v. Canfield, *supra,* where there was an actual and completed sale, but for less than a stated net price: "One of the conditions of the alleged agreement * * * was that he (the broker) should make a sale which should net Mr. Canfield (the owner) $1,200,000. This he did not do. * * * The judge should have directed a verdict in favor of the defendant." In the opinion disposing of Karr v. Moffett, 187 Pac. 683, on petition for rehearing, the Supreme Court of Kansas said: "Appellee sued for an ordinary real estate dealer's commission, alleging that he had earned it in the usual way. * * * The proof of existence of the special contract was surely an effective way of disproving that the defendants owed the plaintiff for services under an ordinary real estate dealer's contract, such as would entitle the agent to the usual commission when he had brought buyer and seller together, whereby they consummated a sale on terms agreeable to each other 'when he had been the procuring cause of the sale', as the stock phrase in such cases is expressed."

The testimony of defendant's witness as to the words of the conversation about the commission, which we think must be regarded as having been accepted by the jury, seems clearly to show that defendant was to receive or be paid the sum of $30,000 for the ranch property before the right to any commission would accrue, or, in other words, the right to the commission was contingent upon defendant's receiving said sum net, and the commission was to consist of the amount received or paid in excess of that sum, or the difference between it and $35,000, the amount to be named as the sale price for the purpose of providing an excess over the required net price for plaintiff's commission. As said witness states, after he had informed the plaintiff that no commission would be paid out of his stated price for either ranch

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or sheep, plaintiff's proposal was that he should name $35,000 as the price for the ranch, and "after getting $30,000 for you for the ranch, the $5,000 will be my commission", and that is to be understood as intending and meaning, we think, that the extra $5,000, that particular part of the total price to be named, was to constitute the commission. This, clearly, in our opinion, amounted to a special contract, taking the case out of the general rule aforesaid, and requiring a completion of the sale by the actual payment or securing of the purchase price to entitle the plaintiff to a commission. There were to be no deferred payments after the consummation of the sale. It was to be a cash transaction. The contract was dated October 15, 1918, at which time the cash payment of $10,000 was made, as recited in the contract, and the balance was required to be paid on or before 30 days from the date thereof, or as soon as abstracts of title should be completed, and the contract provided for the transfer of possession to the purchaser on December 1, 1918.

Where the broker's contract of employment, as in this case, provides for a net price to the owner, or for a commission out of or to consist of the excess above a stated selling price, such contract is generally construed as requiring, as a condition to the right to the agreed commission, an actual or completed sale for an amount exceeding such net or selling price, unless the same has been prevented by the fault of the owner (Beale v. Bond, 84 L. T. Rep. 313; Fletcher v. Campbell, 29 Ont. L. Rep. 501; Gilmore v. Bolio, 165 Mich. 633, 131 N. W. 105, 35 L. R. A. (N. S.) 1050; Beatty v. Russell, 41 Neb. 321; Emery v. Atlanta Real Est. Exch. (Ga.), 14 S. E. 556; Wolverton v. Tuttle, 51 Ore. 501, 94 Pac. 961; Munroe v. Taylor, 191 Mass. 483; McCarty v. Bristow (Tex. Civ. App.), 145 S. W. 1029; Orr v. Schwager & Nettleton, 74 Wash. 631, 134 Pac. 501; Seabury v. Fidelity Ins., etc., Co., 205 Pa. St. 234; Burnett v. Potts, 236 Ill. 499; Nudelman v. Wildes, 160 Ill. App. 134; Hopkins v. Settles (Okla.), 149 Pac. 890; Cies v. Gale, 168 Mo. App. 282; Seattle Land Co. v. Day, 2 Wash. St., 27 Pac. 74; Ford v. Brown, 120 Cal. 551, 52 Pac. 817;

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Atwood v. Gugel, 166 Wis. 430; Larson v. Burroughs, 131 App. Div. N. Y. 877).

This is well illustrated in the Pennsylvania case of Seabury v. Fidelity etc. Co., *supra*. The agreement for the commission in that case was in the form of a written promise of the owner to pay, "in the event of a sale of the property" a commission of one per cent on the amount of $1,400,000, and, "in addition to the above * * * all the amount in excess of one million, four hundred thousand dollars". The broker procured a purchaser who entered into a contract to buy at $1,500,000, but who, after extensions of time for payments under the contract, was unable to complete the required payments, but was negotiating with the owner about the matter when the owner died, and his executors refused to carry out the contract. Suit was brought for the one per cent on the stated selling price of $1,400,000, and for the excess of $100,000 over that sum which the purchaser had agreed to pay. Recovery was allowed for the one per cent on the owner's fixed selling price, but denied for the excess over that price, the court saying: "In the first place, we think it clear that the rights of Seabury (the broker) rest solely on his contract with Moore; he does not sue on a *quantum meruit;* his statement is based on that contract; no reasonable interpretation can be given it other than that he was only to receive the excess over $1,400,000 in the event of a sale being actually consummated. It was not consummated, no matter from what cause."

In the Illinois case above cited, of Burnett v. Potts, the case was thus stated: Appellees were the owners of land which they authorized appellant to sell for $35,000 net cash to appellees, appellant to have as compensation all that he could sell the land for over that sum. Appellant made a contract of sale with one Bowman for $37,500, $1,000 of which was paid to him at the time of executing the contract, the balance to be paid at different times between the date of the contract and the first of March following. The appellees furnished an abstract showing a merchantable title and executed a deed and deposited it in escrow with a bank

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to be delivered to the purchaser when the $35,000 was paid to the bank for the appellees. Bowman made default and never paid anything except the $1,000. Suit was brought by the appellees against appellant for the $1,000 held by him, which he claimed as commission. The court said:

"The money sued for was paid to appellant in his capacity as agent for the owner. The money at no time belonged to the appellant, as between him and his principals. Appellant was not entitled to any compensation for making this sale until appellees received the $35,000, unless their failure to so receive it was the result of their own fault. That it was not the fault of appellees is determined against the appellant by the affirmance of this judgment by the appellate court. * * * Such contracts differ from the usual agency contract where the compensation is a per cent of the price at which the sale is made, only in that the compensation is contingent upon the agent's obtaining more for the land than the owner has agreed to accept. If appellant had sold this land for $35,000 he would have been compelled to turn the entire proceeds over to his principals. We do not see upon what legal grounds he can retain any part of the purchase money when only $1,000 has been paid."

In the English case, Beale v. Bond, *supra,* the owner gave a so-called commission note to the broker reading as follows: "I agree to accept the sum of 1,150 pounds for the above property, and you are to be at liberty to receive anything over and above that as a commission, it being understood that I am to receive the full sum of 1,150 pounds without deduction, except, of course, apportionments of outgoings. Completion to be within a month, and a deposit of 10 per cent to be paid down." The broker made a contract in behalf of his principal for the sum of 1,250 pounds and was paid 25 pounds as a deposit. Owing to the purchaser's default, the sale was not completed, and the owner brought suit to recover the deposit from the broker. The court said:

"This is a very special contract, by which the plaintiff made a special bargain with the defendant and not a bar-

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gain to pay commission in the ordinary way. The plaintiff did not intend to pay anything; the defendant was not to be paid by the plaintiff at all, but was to take any difference above 1,150 pounds which might be actually received by the plaintiff."

In the syllabus to the Ontario case of Fletcher v. Campbell, *supra,* the decision is thus stated: "Where the only agreement for payment of an agent's commission on a sale of land for his principal contains the term that it is to be paid out of the purchase money, the agent cannot recover if the sale falls through without the fault of his employer, and the only money the employer or agent receives on the purchase is the deposit, which falls to be forfeited."

In the case cited from Massachusetts, Munroe v. Taylor, it appeared that there was an agreement placing the property in the agent's hands for sale as follows: "The price asked by Ann E. Taylor is $10,000. All over that amount that it is sold for F. B. Munroe has as his commission for selling the property." A second agreement was made authorizing a sale "for the sum of $10,330, and F. B. Munroe is to have for himself as commission all over that amount he can get for it." A binding contract to purchase at a price largely in advance of the amount so fixed was entered into as a result of the agent's negotiations, but for reasons said to be not disclosed the sale was never consummated. The suit was to recover the broker's commission. A verdict was directed for defendant, and on exceptions before the appellate court it was said, in disposing of and over-ruling the same:

"The case turns upon the construction to be given to the contract. By the language used it is manifest that the price at which the property sold was to fix the amount of plaintiff's commission. It was contemplated that an actual sale should be effected, and that payments to him should be made from the price obtained, and it was not an undertaking whereby the broker is only to find a purchaser, and having done so it becomes wholly immaterial so far as earning his commission is concerned whether the principal accepts the

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bargain, or lets the opportunity lapse. * * * But here the written agreements out of which the plaintiff's right of action arises, either considered separately or together, must be construed as meaning that the sale was to be completed, and then out of the price any surplus beyond the amount stipulated which the defendant was to receive shall be paid to him for his services. What the plaintiff really undertook was not only to find a purchaser at a fixed price, but to effect a sale, which meant a payment of the price, and this having been done he would have earned the excess, but until the consideration became payable, or the defendant refused to convey, he could not demand any remuneration, or maintain an action for breach of the contract."

The facts of the California case of Ford v. Brown, briefly stated, were: That the owner gave the brokers written authority to sell her real estate for $15,500, "or any less sum hereafter fixed by me in writing," and thereby agreed "to pay them $500 of purchase price when property is sold or a purchaser found." A little more than a year later the brokers found a purchaser at the price of $15,250, and made a contract of sale with him for that sum. Thereupon the owner gave the brokers a writing stating: "I hereby ratify sale of my lot this day made by G. H. Umbson & Company, for the sum of $14,800 net to me." It did not appear that the sale was ever consummated. The brokers brought suit for $450 commission. The court said that the sale was not made under the old contract, but under the new one whereby the brokers were authorized to sell at any price so that they gave the owner $14,800 net. "She did not agree to pay them anything for their services. On the contrary, the brokers were, in effect, told that she would not pay them, but they must get their pay from the purchaser. * * * Under the contract last made it would follow that the brokers were entitled to no compensation, unless the sale was perfected, and purchase money exceeding $14,800 was received."

The offer of the owner in the Georgia Case of Emery v. Atlanta R. E. Exch., *supra,* was to sell for $11,250 net.

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The broker accepted it, "upon condition that sale is perfected", a condition which the court said was probably inserted for the protection of the broker against any obligation on their part to buy the land, but which operated also in favor of the seller. The court further said, that the sale for $11,250 net was to be for cash, in the absence of contrary specifications, and that the conclusion of a binding contract for the sale would not fulfill the broker's obligation, but the sale itself must be perfected within the time limited.

In Wolverton v. Tuttle, *supra,* the Supreme Court of Washington say that "the use of the expression 'net' to the vendor necessarily precludes any inference that Tuttle was to pay a commission in the event of a sale, unless the sum received should exceed the specified 'net' price. It can only be inferred that plaintiffs were either to look to this excess, if any, or to the purchasers for their compensation."

Plaintiff strongly relies upon Yoder v. Randol, 16 Okla. 308, 83 Pac. 537, as sustaining his contention that upon the facts in the case his commission was earned when the contract of sale was entered into. That case, with respect to the point here involved, was decided upon the pleadings, the trial court having rendered judgment upon the pleadings, and the Supreme Court held that the answer not only failed to rebut the averment in the petition of the employment and of a compliance with the terms thereof, but recognized the procurement of a purchaser by plaintiff, and acceptance of such purchaser by defendant, and it is stated in the opinion in the case that the petition alleged that the contract was to pay plaintiff a commission to consist of the excess above the net price to defendant of $2,750, that a purchaser was procured for $3,000, that defendant entered into a written contract of sale with said purchaser, *"and has since then duly conveyed said land to said purchaser."* A very different situation from that disclosed by the pleadings and evidence in the case at bar. The later Oklahoma case of Hopkins v. Settles, *supra,* which was cited and quoted from in our former opinion, shows the opinion of the Supreme Court of that state with reference to the right to recover a

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commission upon facts quite similar to those in this case, and, in effect, substantially the same. And, in that case the right to recover was denied.

The point is made in the petition for rehearing and brief that there was a variance between defendant's proof and the allegations of the answer. And it is argued in support thereof that the answer admits the contract of employment alleged in the petition, and fails to allege a special contract. We think it very clear that the answer does not admit the contract between the parties as alleged in the petition, but does allege a special contract. It first denies, generally, each and every allegation of the petition not specifically admitted, and then alleges that defendant advised plaintiff it was willing to sell at the prices of $30,000 for the ranch and $17 per head for the sheep, but would not pay any commission at those prices, and that upon plaintiff then representing that he had a purchaser who would pay $35,000 for the ranch and $17 per head for the sheep, defendant agreed that, if plaintiff produced a purchaser who would *purchase* and *pay* for the property at the prices named, then the defendant would pay plaintiff the sum of $5,000, *"the difference between the price for which plaintiff was willing to sell and the price plaintiff represented the purchaser produced by him would pay therefor."* By that averment plaintiff was to receive or be paid the sum named out of the purchase money when paid, and it was to be the excess above the net price to the owner of $30,000.

It seems to be also contended that by the execution of the contract of sale the defendant *actually received* the purchase money. Of course, no authority so holds, and it is perfectly obvious that no part of the purchase price, except the sum of $10,000, was received by the defendant. The balance was surely not paid, nor secured by the purchaser, and could not, therefore, have been received.

The petition for rehearing must be denied.

Rehearing denied.

BEARD, C. J., and BLYDENBURGH, J., concur.

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ROBINSON MERC. CO. v. DAVIS.

(No. 937; Decided March 8, 1920; 187 Pac. 931.)

MORTGAGES—MORTGAGE TO PARTNERSHIP—MORTGAGE CREATES A LIEN BUT DOES NOT PASS TITLE—NOTICE OF FORECLOSURE—SUFFICIENCY OF DESCRIPTION IN NOTICE—EVIDENCE—JUDICIAL NOTICE OF BOUNDARIES—ESTOPPEL—SUBSEQUENT ACQUISITION OF TITLE BY MORTGAGOR DOES NOT INURE TO BENEFIT OF MORTGAGEE.

1. Since a mortgage merely creates a lien upon the land and does not pass title thereto, a real estate mortgage may be executed to a partnership.
2. In this state, the title to property mortgaged, does not pass by the mortgage, to the mortgagee, even on condition broken. The mortgage simply creates a lien upon the land which must be sold on foreclosure to pass the title.
3. A foreclosure sale of land under a valid mortgage lien, will at the expiration of the redemption period, extinguish a subsequent judgment lien.
4. Notice of foreclosure of a mortgage executed to a partnership was not objectionable, because it recited the names of the partnership members not named in the mortgage; such recital being mere surplusage.
5. The description of land in a mortgage by abbreviations instead of words, to designate the portions of sections, and failing to state whether the township was north or south, held, sufficient under evidence showing that all the land in the named township was in such township north.
6. Courts will take judicial notice of the boundaries of the counties of the state, of the Government surveys, and of the fact that all the land in a given county, township or range lies in a certain direction from the principal meridian.
7. A mortgage given on land to which mortgagor had no title, containing no covenants of warranty, is insufficient to pass title to mortgagee on mortgagor's subsequent acquisition of title.

ERROR to the District Court, Weston County; HON. E. C. RAYMOND, Judge.

Action between the Robinson Merc. Co. and Leaman Davis and others. There was a judgment in favor of the Upton Lumber and Hardware Co. and the Robinson Merc. Co., brings error.

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Metz & Sackett, for plaintiff in error.

Plaintiff in error is a judgment creditor and claims a lien upon the lands involved, superior to a mortgage deed to the Upton Lumber Co., which, though prior in time to plaintiff's judgment, is attacked on the ground that the alleged mortgagee is a partnership and incapable of taking a mortgage; also that as to 40 acres of the land, mortgagor did not have title to it, on the date of the mortgage, but acquired title subsequent and, under the circumstances, the judgment lien attached as a first lien; the published notice of foreclosure was defective for insufficient description of the land; the certificate of sale under the mortgage foreclosure did not show that a sale had taken place, and it was not acknowledged nor entitled to record, hence insufficient to authorize a sheriff's deed. The 40 acres was acquired after the execution of the mortgage and became subject to the lien of judgment of plaintiff in error (23 Cyc. 1376-81; Coad v. Cowhick, 9 Wyo. 316); the mortgage to the partnership, defendant in error, conveyed no title and could not be foreclosed by advertisement (Menage v. Burke, 45 N. W. 156; Gille v. Hunt, 29 N. W. 2; Tidd v. Rines, 2 N. W. 497); findings numbered 15, 18, 19, 20, 23 are unsupported by the evidence; conclusions of law numbered 5, 6, 13, 14, 16, 17, 18, 21, 25 are not sustained by the evidence or the findings of fact; important portions of the decree are not supported by the evidence and are contrary to law.

Camplin & O'Marr, for defendants in error.

There is but one assignment in the petition in error, to-wit: the overruling of the motion for a new trial, but it does not appear in the petition that it was excepted to; errors of law complained of in the motion were not excepted to at the trial, and are, of course, not reviewable (Elliott App. Pro. 795); this is insufficient (12 Kinkead Code Pleading 1275). The petition does not describe the cause wherein the errors occurred, or the judgment to be reviewed as required by Court Rule No. 10. The bill of exceptions is not properly authenticated; the mortgage of the Upton Lumber Co. was

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prior in time to the judgment of plaintiff in error; the attaching of a judgment lien does not disturb existing equities (13 Cyc. 1377); the mortgage given the Upton Co. was not a conveyance, but merely a security (40 N. W. 255; 12 A. S. R. 736; 41 N. W. 1056; 95 A. S. R. 742; 75 N. W. 1109); in this state a mortgage is not a conveyance; the judgment of plaintiff in error never attached to the 160 acres (Section 2296, U. S. R. S.); irrespective of the Upton Lumber Co. mortgage, the plaintiff in error could get out an execution against W. H. Ware and take the 160 acres, for the reason that it was exempt from claims that accrued prior to patent (45 Pac. 766; 32 Pac. 460; 70 N. W. 933); but the owner can mortgage it (7 Pac. 693); a mortgage covers after acquired title (42 N. W. 88; 37 N. W. 417; Fuller v. Hunt, 20 Pac. 425). The judgment of the court below should be affirmed.

BEARD, CHIEF JUSTICE.

The only controversy in this case in this court is between the plaintiff in error, Robinson Mercantile Company, and the defendant in error, The Upton Lumber and Hardware Company, The Upton Lumber and Hardware Company claiming to be the owner of two hundred acres of land situated in Weston county, upon which the Robinson Mercantile Company claims a lien by virtue of a certain judgment. The court found in favor of The Upton Lumber and Hardware Company and entered a judgment and decree accordingly, from which the Robinson Mercantile Company brings the case here by proceedings in error.

The facts as they appear by the record are that, December 15, 1909, William H. Ware made final homestead proof and received the receiver's receipt for the N. ½ of the N. W. ¼, the S. E. ¼ of the N. W. ¼, and the N. E. ¼ of the S. W. ¼ of section 35, township 48 North, Range 67 West of the 6th principal meridian, containing 160 acres. That he received a patent therefor from the United States July 12, 1913. That December 29, 1909, Henry E. Ware and wife gave to said William H. Ware a warranty deed to the

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N. E. ¼ of the S. W. ¼ of section 26, in said township and range, containing 40 acres, which deed was filed for record, February 10, 1910. That Henry E. Ware received a patent from the United States for said last above described land December 26, 1913. That June 17, 1911, William H. Ware and wife gave a mortgage on said 200 acres of land, and other lands, to The Upton Lumber and Hardware Company to secure a promissory note for $866.15, dated June 17, 1911, due six months after date, with interest at 10% from date, said mortgage being filed for record June 23, 1911. Said mortgage was foreclosed by notice and sale July 10, 1915, The Upton Lumber and Hardware Company becoming the purchaser of said 200 acres for the full amount due on said mortgage. That The Upton Lumber and Hardware Company is a co-partnership composed of Charles E. Foster and Harold H. Jones. That Robinson Mercantile Company, a corporation, obtained a judgment in the District Court of Weston County September 12, 1912, against William H. Ware and Jessie A. Ware, his wife, for $1,387.74, which remains unsatisfied.

Counsel for plaintiff in error attacks the validity of the Upton Co. mortgage on two grounds. First, that it is not made to any person or corporation, the mortgage being given to "The Upton Lumber and Hardware Company". Second, "The mortgage does not state whether the township is north or south, or whether the range is east or west, and the description of the land is given entirely by abbreviations instead of words, to designate the portions of sections".

Neither of those objections are good. No authorities are cited by counsel in support of either. As to the first, the decisions are to the contrary. In Barber v. Crowell, 55 Neb. 571, that court said: "But, on the assumption that the mortgagee was a partnership or unincorporated association, it is contended that it could not take title to real estate, and that the mortgage was, therefore, a nullity. It is undoubtedly true that a conveyance of land will be ineffectual to pass the legal title unless made to a grantee having capacity to receive it; and it is also true that a partnership possesses no

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such capacity. But a mortgage is not a conveyance. It is a mere security in the form of a conditional conveyance, and the interest which it vests in the mortgagee is not essentially different from that created by a mechanic's lien or an ordinary judgment (Davidson v. Cox, 11 Neb. 250; Buchanan v. Griggs, 18 Neb. 121). In the former case it was said: 'In this state, a mortgage of real estate is a mere pledge or collateral security creating a lien upon the mortgaged property, but conveying no title nor vesting any estate, either before or after condition broken.' That a lien on real estate to secure an indebtedness may accrue to a partnership in its firm name has been decided in Foster v. Johnson, 39 Minn. 380, and in Chicago Lumber Co. v. Ashworth, 26 Kans. 212." And in Bank v. Johnson et al., 47 O. St. 306, in the opinion in which case a number of authorities are cited, that court said: "The instrument, the validity of which is questioned in this case, was designed by both parties to be a mortgage. This is apparent on the face of it. The only objection made to it is, the incapacity of the partnership in its firm name to take and hold the legal title to real estate. But this is not material, for if it were so, then, as already shown, Johnson, the mortgagor, would hold the legal title in trust as security for the firm. In such case there would be no need of a formal reformation, as it would be the duty of the court, in the exercise of its equity powers, to treat that as done which ought to have been done, and give effect to the instrument in a proceeding to enforce it, according to the priority of its record, by awarding to the bank a lien upon the land for the satisfaction of the amount due it." In this state, as in the cases cited, the title to the property mortgaged does not pass by the mortgage to the mortgagee even on condition broken. The mortgage simply creates a lien upon the land, and it must be sold on foreclosure to pass the title.

The mortgage was a valid lien from its date upon the 160 acres of land in section 35, and the sale thereof on foreclosure, and the period for redemption having expired, the lien, if any, of the judgment of the Robinson Mercantile

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Company become extinguished. Some objection is made to the sufficiency of the notice of foreclosure because it recited that The Upton Lumber and Hardware Company consisted of Charles E. Foster and Harold H. Jones. That recital was mere surplusage and did not vitiate the notice. As to the second objection, that the land was not sufficiently described in the mortgage, it was described as "situated in the county of Weston, in the state of Wyoming, to-wit: NE¼ of SW¼, SE¼ of NW¼, N½ of NW¼, section No. 35, T. 48, Range 67 West." That was sufficient to clearly identify the land. Counsel is in error in stating that the range was not recited therein as "west", and there was evidence to the effect that all lands situated in township 48 in Weston county were in said township *north*. In addition to that, courts take judicial notice of the boundaries of the counties of their state, of the government surveys, and of "the fact that all the land in a given county, township or range lies in a certain direction from the principal meridian" (17 A. & E. Enc. Law, 912 *et seq.*). And the same is true as to townships (Stoddard et al. v. Sloan et al., 65 Ia. 680; Dawson v. James et al., 64 Ind. 162; McChesney v. City of Chicago, 173 Ill. 75; Muse v. Richards, 70 Miss. 581; Chambers v. Ringstaff, 69 Ala. 140).

The 40 acres in section 26 is in a different situation. While it is stated in the brief of counsel for defendant in error that "a final receipt as a desert land entry was issued to Henry E. Ware Aug. 22, 1907," for that 40, and the court found that at the time of the execution of the mortgage by William H. Ware and wife to The Upton Lumber and Hardware Company, Henry E. Ware had made his final desert entry proof thereon, the record fails to support that finding. Such receipt, if it had been issued, was not offered in evidence, nor can it be found in the record. We have searched the record in vain for evidence showing such to be the fact. There is nothing in the record showing that Henry E. Ware had any title either legal or equitable to this land prior to the date of the patent, December 26, 1913, or showing that he had made final proof thereon prior to the

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date of the mortgage. Henry E. Ware having no title at the time he executed the deed to William H. Ware in 1909, the mortgage of the latter to The Upton Lumber and Hardware Company created no lien upon that 40, and, the mortgage containing no covenants of warranty, no title which he acquired, or which inured to him by virtue of the warranty in the deed from Henry E. Ware, subsequent to the date of the mortgage would inure to the benefit of the mortgagee. The facts here, as they appear by the record, are different from those in the case of Roberts v. Hudson, 25 Wyo. 505. In that case the grantor in the quit claim deed, which was held to be a mortgage, had made final proof on his desert land entry prior to the date of the deed, and had the equitable title at the time the deed was executed. In the present case the mortgagor had no title at the time the mortgage was given. For the reasons stated, the judgment is affirmed in so far as it affects the lands situated in said section 35, and reversed as to the 40 acres situated in said section 26, and the case will be remanded for a new trial as to that 40 acres, and it is so ordered. Each party to pay their own costs in this court.

Affirmed in part and reversed in part.

POTTER and BLYDENBURGH, JJ., concur.

GOODRICH v. BIG HORN COUNTY BANK.

(No. 940; Decided January 11, 1919; 177 Pac. 134.)

APPEAL AND ERROR—REQUIREMENTS OF RECORD—WORDS AND PHRASES.

1. A "Record on appeal" under the statute requiring such record to be filed within 70 days after judgment, includes a transcript of the evidence when necessary, with the original pleading, motions, etc., attached together, paged, and numbered consecutively and certified to by the Judge and Clerk as true and correct.

APPEAL from the District Court, Big Horn County; HON. P. W. METZ, Judge.

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E. E. Enterline, Thomas M. Hyde and *H. W. Rich,* for plaintiffs and appellants.

C. A. Zaring, Herbert V. Lacey and *John W. Lacey,* for defendants and respondents.

BEARD, CHIEF JUSTICE.

In this case a motion for leave to withdraw the record for the purpose of having the same amended so as to show the date of the entry of the judgment in the case was denied August 17, 1918, 26 Wyo. 42, 174 Pac. 191, for the reasons there stated and which need not be repeated here. It is now contended that inasmuch as the transcript of the evidence, duly certified by the Court Reporter, was filed with the Clerk of the District Court within seventy days after the entry of the judgment, the appeal was perfected in time. But a transcript of the evidence, when necessary, is only a part of the record on appeal, and it together with the original pleading, motions, etc., are required to be attached together and the whole record to be paged and numbered consecutively, and shall constitute the record on appeal, and shall be certified to by the Judge and Clerk as true and correct. It is such a record, as we construe the statute, which is required to be prepared and filed within seventy days after the entry of the judgment or order appealed from, which time may be extended by the court or Judge for cause shown. No specifications of error were filed within that time, and counsel say, that they had ten days after the record was filed within which to serve and file the same according to the provisions of section eight of the act which reads, "The appellant shall, within ten days after the record on appeal is prepared and filed, serve upon the adverse party, or his attorney, and file with the clerk of the District Court the specifications of error relied upon for a reversal of the cause on appeal." Whether the specifications of error must be filed and make part of the record before the same is certified and filed, is immaterial in this case for the reason that the record was not certified or filed within the required time. The record discloses that if amended in the particulars stated in the

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motion it would still appear that the appeal was not perfected in time. A rehearing is therefore denied.

Rehearing denied.

POTTER, J., concurs.

BLYDENBURGH, J., being ill, did not participate.

GOODRICH v. BIG HORN COUNTY BANK.

(No. 940; Decided March 15, 1920; 188 Pac. 36.)

APPEAL AND ERROR—RECORD INSUFFICIENT TO CONFER APPELLATE JURISDICTION.

1. Where an appeal was not perfected within the time allowed therefor, the right to appeal was lost and the Supreme Court acquired no jurisdiction of the subject matter of the case by the filing with it of such record on appeal.

APPEAL from the District Court, Big Horn County; HON. P. W. METZ, Judge.

Heard on motion for leave to withdraw the record for purposes of amendment. (See former opinion, 26 Wyo. 42, 174 Pac. 191, 26 Wyo. —, 177 Pac. 134.)

E. E. Enterline, Thomas M. Hyde and *H. W. Rich,* for plaintiffs and appellants.

C. A. Zaring, Herbert V. Lacey and *John W. Lacey,* for defendants and respondents.

BEARD, CHIEF JUSTICE.

In this case a motion of appellants for leave to withdraw the record for the purpose of presenting the same to the District Court for amendment was denied August 17, 1918 (26 Wyo. 42, 174 Pac. 191), and a rehearing on that question was denied January 11, 1919 (177 Pac. 134). The object sought to be attained by the proposed amendment was to have the record on appeal show the date of the entry of the judgment and thereby show that said record was filed in the District Court within the time allowed by law in order

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to confer jurisdiction of the appeal on this court. The motion was resisted by respondents, and it was held that "if the record should be amended to show the entry of the judgment on the date stated in the motion, it would affirmatively appear from the record that the appeal was not perfected within the time specified and limited by the statute." On the final submission of the case, respondent's counsel maintain that upon the face of the record, and the decision of the court on the motion, the court is without jurisdiction to hear the cause. The appeal not having been perfected within the time allowed therefor, the right to appeal was lost, and this court acquired no jurisdiction of the subject matter of the case by the filing, in this court, of such record on appeal. Therefore, the appeal is dismissed. *Appeal dismissed.*

POTTER and BLYDENBURGH, JJ., concur.

PHELAN v. CHEYENNE BRICK CO.

(Nos. 927, 928, 929; Decided March 29, 1920; 188 Pac. 354.)
(Rehearing Denied May 28, 1920; 189 Pac. 1103.)

MECHANIC'S LIENS—AGENCY—RATIFICATION OF AGENT'S ACTS—PLEADING—AMENDMENT TO CONFORM TO FACTS PROVEN—VARIANCE—JUDGMENT—DEFECT OF PARTIES WAIVED—CONTINUANCE—STIPULATION AS TO TESTIMONY OF ABSENT WITNESSES—LIEN STATEMENT—PRESUMPTIONS—EVIDENCE—FINDINGS ON CONFLICTING EVIDENCE—LIEN FOR MATERIALS FURNISHED AFTER DATE FOR COMPLETION OF CONTRACT—NEW TRIAL.

1. Where materials furnished and work performed by lien claimants under contracts with a husband were for the benefit of property jointly owned by the husband and wife, a prima facie case was made that the husband was acting as the wife's agent under the express provisions of Comp. Stat. 1910, Sec. 3817.
2. Where a husband and wife decided to build a house, on a lot jointly owned by them, for a home, and the wife selected the plans and specifications, went with the husband to the architect to have the plans drawn, joined in a mortgage to obtain money for construction, and was often

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upon the premises as the work progressed, her conduct showed that she either authorized or ratified her husband's act in contracting for the construction of the house.

3. In suits to enforce mechanic's liens, amendments to the petitions to conform to the proof, by alleging that the defendant husband, in contracting with the principal contractors, was acting as agent for his wife as well as for himself, were properly permitted.
4. In suits to enforce mechanic's liens, there was no fatal variance between lien statements filed as though both husband and wife were parties to the contract and the contract proved, which on its face purported to be a contract between the husband and the principal contractors, where the facts showed that the plaintiff was an undisclosed principal.
5. Under Comp. Stat. 1910, 3808-3810, judgments enforcing liens of materialmen and laborers were in proper form, though they contained no personal judgment against the principal contractors, where such contractors were not served within the state and did not appear.
6. In suits to enforce mechanic's liens, if the failure to serve the amended petitions on the principal contractors operated as a discontinuance of the suits against them, and created a defect of parties defendant, the defendant owners waived the defect, and could not avail themselves of it in the Supreme Court, where it was not raised by demurrer or answer in the trial court.
7. In a suit to enforce a mechanic's lien, a stipulation, made to avoid a continuance, that an absent witness, if present, would testify that notice of the claim and of the intention to file a lien was served on defendants, of which notice a copy was attached and marked "B", constituted sufficient evidence of the notice of intention to file the lien, without formally offering the notice in evidence.
8. In a suit to enforce a lien, there was no fatal variance between a petition, alleging that brick were furnished at the agreed price and were of the reasonable value of $154 and a lien statement, alleging that they were of the fair and reasonable value of $154; the evidence showing that they were of that value.
9. A discrepancy in a lien statement as to the date materials were furnished was immaterial, where no one was misled thereby, though the statement would have been filed too late if the date mentioned therein had been the correct date.

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10. That the names of the principal contractors were given in a contract for the construction of a building as D. and C. in the lien statement as Henry D. and J. M. C., and in the petition as Henry S. D. and James M. C., was immaterial, where the owners were not misled, and the contractors were described and identified in each instance as the contractors having such contract.
11. Where the petition in a suit to enforce a lien alleged the filing of a lien statement, but failed to allege that it was sworn to, an amendment curing the alleged defect was properly allowed.
12. Where the materials furnished by a lien claimant were used in the construction of a house, the labor performed was on such house, or on materials that went into it during construction, and were accepted and became a part of the house, and the materials were such as were not infrequently used in the construction of houses, and were presumptively such as were contemplated by the plans and specifications, it was immaterial whether the claimant knew of the contract between the owner and the principal contractors.
13. Where it was not shown that materials and labor furnished by a lien claimant were not such as were contemplated by the plans and specifications for the building, the presumption was that they met the requirements of such plans and specifications, having been ordered by the contractors and used in the building.
14. Where suits to enforce liens were tried together, and in one of the suits one of the defendants testified to a written agreement between him and the principal contractors for the construction of the building, and identified it as an exhibit offered and received in one of the other cases, the failure to reoffer it in such case was immaterial.
15. Where there was a conflict in the evidence, and there was substantial evidence to support the finding, it will not be disturbed.
16. Where a contract for the construction of a building was not forfeited for failure to complete it within the time specified, one furnishing materials to the contractors thereafter, and prior to the contractors' abandonment of the contract, was entitled to a lien.
17. In a materialman's suit to enforce a lien, evidence of the dealings between plaintiff and the principal contractors was competent to show the arrangement under which the

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materials were furnished as against the objection that it was hearsay.

18. The failure to sustain motions to strike out evidence will not be reviewed, where it is not specified as error in the motion for a new trial.

19. A specification of error in a motion for a new trial, relating to the overruling of objections to the introduction of evidence does not cover the failure of the court to sustain motions to strike out evidence, to which no objection had been interposed.

ON PETITION FOR REHEARING.

20. A district judge called in to hear a case in the Supreme Court under Const. art. 5, sec. 6, and as amended (see Laws 1917, c. 115) is a "justice" of the Supreme Court within the meaning of Const. art. 5, secs. 4, 5, providing that the justices of such court shall be elected, and that a majority shall be necessary to constitute a quorum.

ERROR to the District Court, Laramie County; HON. WILLIAM C. MENTZER, Judge.

Action for the enforcement of a mechanic's lien by the Cheyenne Brick Co. and others, Frank A. Roedel and others, and the Grier Lumber Co. and others, against Walter Q. Phelan and wife. The three cases were consolidated for trial by stipulation of counsel; there were judgments for plaintiffs in each case and defendants bring error.

The material facts are stated in the opinion.

Ray E. Lee, for plaintiffs in error.

The cases were consolidated for error proceedings and are discussed in one brief; the amended petition in the Roedel case did not allege the finding of a lien claim and is defective (3803 C. S.; 27 Cyc. 386; Halligan v. Herbert, 2 Daly 253; Jones on Liens, 1588). There is no evidence showing this plaintiff had knowledge of the contract in evidence and this constitutes a failure of proof (Rockel M. L. 24-27; 3799 C. S.; Phillips M. L. 60-62; Foster v. Swayback, 58 Ill. App. 581; Garnett v. Berry, 3 Mo. App. 205; Merritt v. Crane Coal Co., 126 Ill. App. 337). In the Cheyenne Brick Company case there was no proof of notice of intention to file lien as required by statute (3815 C. S.; 27

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Cyc. 111, 113); the petition alleges a sale of materials at an agreed price, but the lien statement alleges materials sold at a reasonable value, which was a variance (Birell v. Brown, 63 Pac. 167; Wilson v. Hind, 45 Pac. 695); there is a failure of names of principal contractors in the petition and a lien statement, and a lack of proof as to knowledge of lien claimant, as to contract between builder and contractor as required by 3799 C. S. (see cases above on this point). The contract introduced was not the contract alleged in the petition, and the court erred in admitting it (Davis v. Co., 14 Wyo. 517; Wyman v. Quayle, 9 Wyo. 326); the lien statement contradicts the petition (1379 C. S.; Jones on Liens, 1325). In the Grier Company case, materials furnished after November 12, 1915, were furnished under a different agreement from materials previously furnished, a fatal variance (Henry v. Mahone, 23 Mo. App. 83-27, Cyc. 144; O'Driscoll v. Bradford, 58 N. E. 628; Greenway v. Turner, 4 Md. 296; Sturn v. Ritts, 7 O. 135; Treusch v. Shryock, 51 Md. 162; Basham v. Teoors, 51 Ark. 309; 11 S. W. 282). The Roedel petition fails to allege a sum unpaid or promise to pay, which renders it insufficient (Hurly v. Ryan, 51 Pac. 20; Dodge v. Kimple, 54 Pac. 94; Stanton v. Keurick, 35 Mo. App. 19; Hudleson v. Bank, 71 N. W. 304); the petition fails to allege a contract between claimant and original contractor, or the lien claimant and owners (Baker v. Winter, 15 Md. 1; Reed v. Norton, 26 Pac. 767; Arnold v. Exchange, 123 Ga. 731; Kirn v. Co., 86 Va. 608); in neither case is the evidence sufficient to show contract between defendants and contractors (Brennan v. Miller, 97 Mich. 182; 56 N. W. 354; Snyder v. Sparks, 103 N. W. 662). The contract received in evidence was not the contract pleaded and was not admissible (Jennings v. Huggins, 54 S. E. 169; McAdau v. Miltonberger, 75 Mo. App. 346; Cockerell v. Henderson, 50 L. R. A. N. S. 1; Huffman v. Ackley, 34 Mo. App. 277). This is true as to all three cases; petition did not allege that Walter Q. Phelan was acting as agent for co-defendant (4437 C. S.). Evidence shows wife not to be a party to the contract (Meyer v.

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Broadwell, 83 Mo. App. 571; Thompson v. Keheren, 60 Mo. App. 481; Duross v. Broderick, 78 Mo. App. 260). The findings and judgments do not conform to the statutes governing such cases (3808, 3810 C. S.) A personal judgment is necessary to sustain a judgment establishing a lien (Steinkamper v. McManus, 26 Mo. App. 51; Webbing v. Powers, 25 Mo. 599; Jones v. Hall, 35 N. E. 923; Farley Bros. v. Camonn, 43 Mo. App. 168; Hassett v. Rust, 64 Mo. App. 325). Each of the causes should be reversed.

Thomas Hunter, for defendant in error, Frank A. Roedel.

Matson & Kennedy, for defendant in error, Cheyenne Brick Company.

William B. Ross, for defendant in error, Grier Lumber Company.

Pleading over is a waiver of defects in pleading, which may be cured by amendment (37 Cyc. 397); such admissions are proper in lien cases (27 Cyc. 400; Newman v. Jefferson City, 19 Mo. App. 100; Clark v. Huey, 40 N. E. 152 and cases cited), and permissible under our statute (4437-38 C. S.). Cases cited by plaintiffs in error as to variances between the lien statement and the pleading are not in point; the lien statement was shown to have been filed in time in the Cheyenne Brick Company case; there was no variance in names of contractors, as was shown by the evidence (Durham v. Shindler, 20 Pac. 326; Steinman v. Strimple, 29 Mo. App. 478-85. The materials were delivered to employees of the contractors according to the evidence; no provision of the original contract could affect or restrict the rights of sub-contractors (Lumber Co. v. Harris, 107 Mo. App. 148; 3803 C. S.); the lien period ran from the delivery of the last item of material (Bruce v. Berg, 8 Mo. App. 205; Lumber Co. v. Davis, 14 Wyo. 455); the contract introduced in evidence as the identical contract under which the parties operated as shown by the evidence; it was shown by a preponderance of the evidence that the husband was the agent of the wife (Lumber Co. v. Stevens, 84 Mo. App. 558), and the issue was properly submitted

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(Farley v. Strock, 68 Mo. App. 89; Barker v. Berry, 40 Mo. App. 58). The former rule of the Missouri courts requires proof of agency to be cogent and strong, where a husband is acting for his wife (Long v. Martin, 71 Mo. App. 573). However, under the Wyoming statute, the building could be removed and sold under execution (3801 C. S.; McDonall v. Nickolsen, 67 Mo. App. 408). Phelan accepted notice of intention to file a lien for himself, and also as agent for his wife (Lumber Co. v. Mahan, 53 Mo. App. 428). The point, with reference to an error in the caption of the judgment, is without merit (Black, Section 116). A personal judgment against contractors is unnecessary (3809 C. S.). Such is in the effect of the Missouri decisions (Steinman v. Strimple, *supra,* Holland v. Cunliff, 96 Mo. App. 67). The form of the judgment is sufficient (Schulenburg v. Werner, 6 Mo. App. 292).

Ray E. Lee, for plaintiffs in error, in reply.

On the question of variance in the names of the contractors, the following additional cases are cited (McNally v. Mott, 3 Cal. 235; Fitzgerald v. Solentine, 10 Metc. 436; Thomas v. Desney, 57 Iowa 58; Phillips v. McKaig, 36 Neb. 853; 55 N. W. 259). An extension of time to perform a contract is a new contract, and must be based on consideration (Surety Co. v. Hanson, 184 Fed. 58); and, unless based upon a new consideration, is inadmissible as a defense to a breach of the written agreement (McIntyre v. Co., 60 Pac. 552; Jobst v. Haden Bros., 50 L. R. A. N. S. 501 and notes), the contract terminates with the period fixed by its terms (13 C. J. 599). Time is the essence where a date for completion is fixed (Phillips v. Seymour, 91 U. S. 646; Morrison v. Wells, 29 Pac. 601). One cannot declare on a contract and recover a subsequent parol modification of that contract (13 C. J. 756); modification of a written contract by parol agreement must be proven by clear and convincing evidence (Stickney v. Hughes, 12 Wyo. 397). A petition which does not state a cause of action will not support a judgment (Crewdson v. Nefsy Co., 14 Wyo.

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61; Nichols v. Com'rs, 13 Wyo. 1). The point may be raised for the first time on appeal (Irrigation Co. v. Ditch Co., 21 Wyo. 204). Constructive service cannot be had upon a partnership (Smith v. Hoover, 39 O. S. 249). Service upon one partner is not service upon the firm (19 Pl. and Pr. 900). Allegation of an individual contract is not sustained by proof of a partnership contract (Graves v. Co., 2 Cranch 419; McCord v. Seale, 56 Cal. 262); a material man does not come within Section 3808 C. S. (Rittenhouse v. Co., 264 Ill. 619; Kelly v. Johnson, 251 Ill. 135; 36 L. R. A. (N. S.) 573).

BURGESS, DISTRICT JUDGE.

These are three cases brought here by proceedings in error from the District Court in and for Laramie County, Wyoming, by Walter Q. Phelan and Helen C. Phelan, defendants below, to review three judgments fixing and adjudging liens upon certain premises owned by them and providing for the sale thereof for the satisfaction of the liens. By reason of the rise of these cases out of the same general transaction, the identity of some questions and the similarity of others, in all three, they were, by stipulation of counsel, though separate suits, consolidated for trial in the court below. Separate judgments, however, were rendered and separate motions for new trial filed and overruled. Thereupon, one bill of exceptions was prepared, presented and filed, embodying the evidence and preserving the exceptions in all three cases.

This consolidation has been carried into this court, one brief covering all the cases and all the cases being submitted together for consideration and decision.

On August 5, 1915, Walter Q. Phelan and Helen C. Phelan, plaintiffs in error here, defendants below, were husband and wife and were the owners of certain unimproved premises situate in the City of Cheyenne, Laramie County, Wyoming, on which day a contract in writing was entered into between Walter Q. Phelan, as the owner, and Dugan & Cochran, as the contractors, by the terms of which

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the latter were to furnish all the materials and labor required for the construction of a brick and frame residence on said premises according to the plans, specifications and drawings made by William Dubois, architect, and to complete the same on or before November 5, 1915. The contract was not signed by Helen C. Phelan, nor was she in any way referred to therein.

The contractors proceeded to the construction of the residence in accordance with the terms of the contract, but failed to complete it in time, and, in fact, never did complete it, but finally abandoned it altogether. The Cheyenne Brick Company, The Grier Lumber Company, and Frank Roedel were all lien claimants who, by virtue of contracts with Dugan & Cochran, had furnished building material and performed labor for them in connection with the construction of said dwelling between August 5, 1915, and the time of the final abandonment of the contract by Dugan & Cochran. These lien claimants, not having been paid, served each a notice in writing upon Walter Q. Phelan and Helen C. Phelan of intention of filing a lien, and thereafter filed a claim of lien in the office of the County Clerk of Laramie County, Wyoming. Actions were then brought by them to foreclose the liens and judgments were entered adjudging their claims to constitute liens, concurrent with each other, upon the property of Walter Q. Phelan and Helen C. Phelan, and ordering the sale thereof to satisfy said liens.

So many are the points referred to in the brief of counsel for the plaintiffs in error, of which some are meritorious and others not, that we desire to call attention to Section 4599 of the Wyoming 1910 Compiled Statutes, providing that "No exception shall be regarded unless it is material and prejudicial to the substantial rights of the party excepting," and to state that if, in the course of this opinion, we do not refer to all the matters raised in the briefs, it will be due to the fact that, in our judgment, those omitted come obviously within the inhibition of the statute, and not to any failure on our part seriously to consider them.

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We shall proceed first to the consideration of the questions common to all the cases, and then take up those peculiar to each of them.

It is insisted by the plaintiffs in error that the interest of Helen C. Phelan in the premises is not subject to the liens sought to be fastened thereon, because she did not sign the contract between her husband and Dugan & Cochran, and was not a party thereto. It is contended by the lien claimants, on the other hand, that her husband in entering into the contract and causing the erection of a dwelling upon the lot owned by them jointly was acting not only for himself but as the agent of his wife, and that her interest was, therefore, as much subject to the liens asserted as his.

Upon this question Section 3817, Wyoming 1910 Compiled Statutes, has a direct bearing. It provides:

"Sec. 3817. 'Owner' and 'proprietor' defined—Infants and married women. Every person for whose immediate use, enjoyment or benefit, any building, erection or improvement shall be made, shall be included by the word 'owner' or 'proprietor' thereof, under this chapter, not excepting such as may be minors over the age of eighteen years, and married women; and in case the husband of any married woman shall enter into any contract for the performance of any work, or the furnishing of any material, for which a lien is provided by this chapter for the benefit of the wife's property, the husband so contracting shall be deemed *prima facie* to be the agent of his wife owning such property."

It appearing that the material furnished and work performed by the three lien claimants were for the benefit of the jont property of the husband and wife, a *prima facie* case was made that Phelan was acting as his wife's agent in entering into the contract in question, and that she was bound thereby. It then became incumbent upon her, by virtue of this statute, to overcome, if she could, by proper and sufficient evidence, this *prima facie* case of agency. This she failed to do, and, we may add, did not even attempt to do. Mrs. Phelan was not a witness in any of the cases and there is no testimony whatever that Phelan was not her

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agent in this matter. Phelan testified, but he never said he was not her agent, or that he had no authority from her in causing the construction of the house. He went no further than to say that she was not a party to the written contract with Dugan & Cochran, by which he probably meant that she did not sign the contract and was not referred to therein in any way, which was true. But this is not necessarily inconsistent with the view that he was acting for her as well as himself in making the contract and had authority from her so to do. Phelan's testimony clearly shows to us, as it must have shown to the trial court, that in the construction of the dwelling he was acting, not only for himself, but for his wife as well, and with her authority. He testified in substance that he and his wife together decided to build a house upon the lot in question; that the house so built was to be home for them; that she selected the plans and specifications for the construction of the dwelling; went with him to the architect to have the plans drawn; signed with him a mortgage upon the premises for the express purpose of obtaining a part, at least, of the money for the construction of the house; and that she was often upon the premises as the work progressed. This conduct of the wife is reconcilable only with the fact that she had either authorized or ratified the act of her husband in causing the construction of the house. It can not, therefore, be maintained that the trial court was not justified in holding that Phelan was his wife's agent, acting with authority from her in making the contract in question, and that her interest in the property was as much subject to the liens asserted as was his.

In this connection complaint is made by counsel for plaintiffs in error about the action of the trial court, at the close of all the evidence, in allowing amendments to the petitions to the effect that Phelan, in making the contract with Dugan & Cochran, was acting not only for himself but as agent for his wife. These amendments simply conformed to the facts proven, and there was no abuse of discretion on the part of the court in allowing them.

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Nor was there any fatal variance, because the contract proven was a contract which on its face purported to be a contract between Dugan & Cochran and Phelan, while the lien statements were filed as though both of the Phelans were parties to the contract, for in legal effect Mrs. Phelan was a party to the contract, her relation being that of an undisclosed principal.

Objection is made to the form and substance of the judgments rendered, in that there is no finding "that any one is indebted to the respective plaintiffs, or that said plaintiffs should each have and recover a sum certain, and that the findings and judgments entered do not conform to the requirements of Sections 3808, 3809 and 3810 of the Wyoming 1910 Compiled Statutes."

Dugan & Cochran were made parties defendant to the actions in the court below, but no personal service of process within the State of Wyoming was had upon them or either of them; nor did they appear in any of the actions. Service of process was, however, had upon them in the State of Colorado. The District Court, therefore, had no jurisdiction to render a personal judgment against Dugan & Cochran in favor of the lien claimants, nor were the cases proper cases for the rendition of a personal judgment against any one, nor did the court do so. Sections 3808 and 3810 have no application to the situation presented by these cases. Section 3809 provides in substance that where constructive service only is had upon the debtor, the judgment, if for the plaintiff, shall be that he recover the amount of the indebtedness found to be due and the cost of suit, to be levied out of the property charged with the lien therefor. An examination of the judgments convinces us that they conform in substance to the requirements of this section.

Complaint is also made that the plaintiffs continued their suits as to the contractors, Dugan & Cochran, because there was no service upon them of the amended petitions. If the failure to serve the amended petitions upon Dugan & Cochran operated as a discontinuance of the suits against them and created a defect of parties defendant (which we do not

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decide) the plaintiffs in error can not avail themselves of it here, because such defect was not raised by demurrer or answer in the court below, and was therefore waived (Becker, et al. v. Hopper, et al., 22 Wyo. 237, 138 Pac. 179, 23 Wyo. 209, 147 Pac. 1085).

CHEYENNE BRICK COMPANY CASE.

In this case plaintiffs in error contend:

First: That there was no proof of notice of intention to file a lien required by Section 3815, Wyoming 1910 Compiled Statutes.

It was, however, stipulated in open court at the time of trial, to avoid a continuance, that C. F. Rugg, a witness then absent, would testify, if present, "that on the 30th day of November, 1915, a notice of a claim for material furnished to defendant contractors as set forth in the petition, and that a lien would be filed upon the property described in the petition, was served upon the defendants, Walter Q. Phelan and Helen C. Phelan, of which notice a copy is attached to the petition and marked 'B'."

The point of the contention, as we take it, is that there was no formal offer in evidence of the notice thus referred to. If the notice had been set out in full in the stipulation, or if the witness had been present and in testifying stated that he had served a notice, a copy of which was as follows, and then had read the notice, would it be said that the notice so set out or so read was not in evidence? How, then, does this differ in principle from the situation here? The notice was set forth as an exhibit to the petition, and as such constituted a part of the record. The stipulation identified it and by specific reference brought it into the case as a part of the evidence.

Second: That there is a variance between the petition and the lien statement, in that the former alleges an agreed price for which the bricks were sold, while the lien statement merely alleges the reasonable value of the bricks sold.

The amended petition alleges that the plaintiff furnished the brick "at the agreed price and which were of the reason-

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able value of $154.00". In the lien statement it is said that the materials furnished were of the fair and reasonable value of $154.00. The evidence was that the brick were of the value of $154.00. We do not conceive this to be a material or fatal variance. (See E. D. Metcalf Co. v. Gilbert, 19 Wyo. 331, 116 Pac. 1017.)

Third: That the lien statement was not filed within time.

In the lien statement filed is an allegation that the brick company furnished the brick between August 19, 1915, and September 11, 1915, but attached to and made a part of the lien statement is an itemized account of the bricks so furnished, from which it appears that the last item of brick delivered was September 13, 1915. If September 13th is taken as the correct date of the last item, then the statement was filed in time; while if September 11th is taken, it was not. The petition alleges and the proof shows that the last brick furnished was on September 13th. The plaintiffs in error do not claim that they were in any way misled by this descrepancy, and the date, September 11th, must be regarded as a mere mistake or inaccuracy. Says Cyc., Vol. 27, p. 201, "A mistake or inaccuracy in the statement as to a date is not necessarily fatal if no one is misled thereby to his prejudice; nor would such mistake preclude the claimant, when necessary to sustain his lien, from showing the true date." (See also Chapter 68, Wyoming 1911 Session Laws.)

Fourth: That in mentioning the names of the contractors they appear in the contract with Phelan as Dugan and Cochran; in the lien statement as Henry Dugan and J. M. Cochran; and in the petition as Henry S. Dugan and James M. Cochran.

In all three instances, however, they are described and identified as the contractors who had the contract for the construction of the Phelan residence, and no question is raised that they are not the same parties; nor do the plaintiffs in error claim that they have been misled in any way by reason of the discrepancies. (See Steinmann v. Strimple, et al., 29 Mo. App. 478.)

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Fifth: That the lien statement is insufficient in that it fails to show that the material described therein was furnished to Dugan & Cochran and used on the premises of the defendants Phelan under any contract between Dugan and Cochran and the defendants Phelan.

An examination of the lien statement, however, discloses that this contention cannot be sustained.

ROEDEL CASE.

In this case plaintiffs in error contend:

First: That the amended petition failed to state a cause of action because:

(a) It failed to allege the filing of a verified statement of lien claim in the office of the County Clerk of Laramie County.

(b) It failed to allege a promise on the part of the contractor to pay, and non-payment.

(c) It failed to allege performance of the contract by Roedel with the original contractor.

The amended petition, however, did allege the filing in the proper office of a lien statement and the only defect, if any, relating thereto was the failure to state that it had been sworn to. The court below properly allowed an amendment curing this alleged defect.

As to the grounds (b) and (c), an examination of the amended petition convinces us that they are not tenable.

Second: No cause of action was proved in that:

(a) There is no evidence that Roedel sold the material to, or furnished the labor for, the firm of Dugan & Cochran.

(b) The plaintiff failed to show that he had any knowledge of the contract between Phelan and Dugan & Cochran, and failed to show that the labor performed and materials furnished were in substantial compliance with the principal contract.

As to (a), counsel's attention is directed to pages 28 and 29 of the bill of exceptions, and specifically to the cross-examination by Mr. Lee of Mr. Roedel, from which we believe it will be apparent the contention is without merit.

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As to (b), we fail to see or appreciate, under the facts in this case, the significance of knowledge or lack of knowledge on the part of Roedel of the contract between Phelan and the contractors. However, it appears that, through information imparted to him by Mr. Cochran, he had knowledge of the existence of such a contract, though he had never seen it. This much was developed on cross-examination by counsel for plaintiffs in error.

The materials furnished by Roedel were used in the construction of the house, the labor performed was upon the house, or upon materials that went into the house during construction. They were accepted and became a part of the house. The materials were such as are, not infrequently, used in the construction of houses. There is no evidence that these materials and labor were not such as were called for or contemplated by the plans and specifications forming a part of the contract between Phelan and the contractors, nor can it be assumed that they were not. The presumption is that they met the requirements of the plans and specifications, for they were ordered by the contractors, used in the building, and the owners have asserted no claim that they were not such as were contemplated by the contract.

Counsel for plaintiffs in error, in their reply brief, urge a point not raised in their original brief, namely: That Roedel failed to introduce in evidence any contract between Dugan & Cochran and Walter Q. Phelan.

Phelan testified in the Roedel case to a written agreement signed by him and Dugan & Cochran for the construction of a dwelling house upon the property owned by him and his wife, and identified it as Exhibit "D", which had already been offered and received in the Cheyenne Brick Company case (P. 30, B. of E.) In view of this testimony, and in view of the recital in the bill of exceptions that "the three cases were consolidated for the purpose of trial and one record was made the record of all three cases", we fail to see wherein the failure to re-offer in this case the written contract would constitute error. See Benington v. State, 2 O. St. 160, where it is said:

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"Where an instrument in writing is produced by a party on a trial as evidence, and witnesses examined in relation to it without objection to its admissibility from the other side, it is not error for the court to regard it as in evidence, although not formally offered and read by the party producing it."

GRIER LUMBER COMPANY CASE.

It is contended in this case that the contractors, Dugan & Cochran, abandoned work on the house on November 12, 1915, and that the items furnished thereafter and up to November 19th, inclusive, were improperly included in the lien statement. In answer to this, however, it is sufficient to say that as to just when the work was abandoned by the contractors there is a conflict in the evidence. There is evidence in the record to the effect that from November 12th to November 19th, 1915, inclusive, Dugan & Cochran had an employee or employees upon the job, and that the materials furnished during that time were used in the building. There is substantial evidence, therefore, to support the finding of the lower court sustaining the lien statement, and it should not be disturbed. See 27 Cyc., p. 100, where it is said:

"It is well established as a general rule that the failure of the principal contractor to complete his contract does not, of itself, defeat the right of the subcontractor, workman or material man to a lien."

Nor is there any merit in the contention that, inasmuch as Dugan & Cochran failed to complete the building by November 5, 1915, the date by which, under the contract, it was to be completed, the items furnished thereafter by the lumber company and used in the building were non-lienable items. The undisputed evidence shows a waiver by Phelan of the time for the completion of the contract. Dugan & Cochran continued their work under the contract until at least November 19, 1915, with the knowledge and consent of Phelan. Phelan never declared a forfeiture of their contract on November 5, 1915, or sought in any way to terminate it on that date or any subsequent date prior to

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November 19, 1915, because of their failure to complete the work within the time specified. But he permitted them to proceed under it, and they did proceed under it, the same as though no breach had been committed. This is not a case where the principal contract terminated on November 5, 1915, and where all connection with or authority over the work on the part of the contractors ceased at that time, but is a case where the contract was still in force during the time the materials for which a lien is claimed were furnished. See 6 Cyc., p. 65, note 15. Also see Hydraulic Press Brick Co. v. Green, 164 S. W. 250 (Mo.), where it is said:

"A material man who, under contract with the contractor erecting a building under contract with the owner, furnishes materials for use in the building which are so used is entitled to a lien on the premises for the reasonable value of such materials, and to enforce such lien, regardless of the defaults and delinquencies of the contractor in the performance of his contract with the owner."

It is further contended that "The court erred in admitting statements of Mr. Cochran which were made to Mr. Grier, and which were hearsay and incompetent."

The first statement complained of relates to the dealings between the Grier Lumber Company and the contractors, and was certainly competent to show what the arrangement or contract was between the lumber company and the contractors in the furnishing of the materials that went into the house.

As regards the other two statements complained of, we can find nowhere in the motion for new trial where they were specified as error. In this motion there are only two specifications of error relating to the introduction of evidence, one and seven. Specification one certainly does not embrace these statements, nor does specification seven, because the latter relates only to the overruling of objections to the introduction of evidence, while the errors alleged here consist of the failure of the trial court to sustain motions to strike statements to which no objection had been interposed. Furthermore, specification seven is too general

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and indefinite. (See Holdsworth v. Blythe Fargo Co., 23 Wyo., p. 63). The judgments in all three cases will be affirmed. *Judgments affirmed.*

POTTER, J., concurs.

BEARD, C. J., and BLYDENBURGH, J., being unable to sit in said causes, DISTRICT JUDGES JAMES H. BURGESS and CHARLES E. WINTER were called in to sit in their stead. JUDGE WINTER, having resigned his office prior to the decision, did not participate therein.

ON PETITION FOR REHEARING.

BEARD, CHIEF JUSTICE.

The opinion in these cases was handed down March 29, 1920, and appears in 188 Pac. 354. A petition for a rehearing has been filed by counsel for plaintiffs in error. The only ground for a rehearing stated in the petition is, "that said cases have not been heard by this court; that the opinion filed herein on March 29, 1920, should be disregarded and said cases set down for hearing before this court, for the reason that the number of justices of this court required to transact the business of the court were not present and did not take part in the hearing or determination of said cases." No objection was made, at the time, to submitting the cases to the court as then constituted. The facts are, as stated in a note at the end of the opinion, that "Beard, C. J., and Blydenburgh, J., being unable to sit in said cases, District Judges James H. Burgess and Charles E. Winter were called in to sit in their stead. Judge Winter, having resigned his office prior to the decision, did not participate therein."

The journal of the court further shows that Justice Potter and Judge Burgess were both present and sitting as members of the court at the time the opinion was handed down, it being written by Judge Burgess and concurred in by Justice Potter; and that the other Justices of the court were then present but not participating in the decision. Counsel cites in his brief in support of his petition for a rehearing, Sec. 4, Art. V, of the Constitution, "The Supreme Court of the State

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shall consist of three justices, who shall be elected by the qualified electors of the state at a general state election at the times and places at which state officers are elected," etc. Also Sec. 5, id.: "A majority of the Justices of the Supreme court shall be necessary to constitute a quorum for the transaction of business." Also Sec. 879, Comp. Stat. 1910: "A majority of the Justices of the Supreme Court shall constitute a quorum for the transaction of business. In the absence of a quorum on the first day of an adjourned or regular term, the court shall stand adjourned from day to day until a quorum shall be present; and the court may, there being a quorum present, adjourn from time to time to any subsequent date." He also quotes from 15 C. J. 964, "in the absence of a quorum or number required by law to hold court, a judgment rendered by the remaining Judges will be regarded as a nullity, as in such a case there is no authority conferred to render a judgment." And cites the text of that work and cases in note 58; and Long v. State, Ann. Cas. 1912, A. 1244 and notes at 1251 *et seq.*

Counsel makes no claim, nor can any valid claim be made, that there was not a constitutional quorum of the court present both at the hearing and decision of the cases, or that the decision was not by the necessary number of judges, if the District Judges called in were members of the court for the purposes of the cases and are to be counted in constituting a quorum of the court. But his contention is, that they were not members of the court, and cannot be so regarded. He seems to have entirely overlooked Sec. 6, Art. V. of the Constitution. As originally adopted, it read, "In case a Judge of the Supreme Court shall be in any way interested in a cause brought before such court, the remaining Judges of said court shall call one of the District Judges to sit with them on the hearing of said cause." Under that provision, Judges of the District Court were frequently called and were always regarded as members of the court for the purpose of the case. That section of the constitution was amended in 1917, and now reads, "In case a Justice

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of the Supreme Court shall for any reason be unable to sit in any cause in said court, the presiding Justice of said court shall call one of the District Judges to sit as a member of said court on the hearing of said cause." Thus increasing the causes for which a District Judge should be called, and expressly providing that he should be, when so called, a member of the court. The language of said section of the constitution is too plain to admit of but one construction, which is, that the judge so called is as much a member of the court for all purposes of the cause in which he is so called, as a regularly elected Justice of the Supreme Court. The members of the constitutional convention evidently foresaw that in the absence of such a provision a condition might arise in which the business of the court would be long delayed. Indeed, but for that provision, the condition might be such that a quorum of the court could not be secured for the hearing and decision of a certain case for nearly six years. If a District Judge who is thus called to sit in any cause is not a member of the court for all purposes of the cause, we are unable to explain for what purpose he is so called.

With the exceptions that it requires a quorum of the court to transact business, and that the decision must be by a majority of such quorum, the authorities cited by counsel in his brief do not sustain his contention, but are against it.

For the Territory of Utah the Act of Congress provided: "The Supreme Court consists of a Chief Justice and three Associate Justices, any three of whom shall constitute a quorum; but no Justice shall act as a member of the Supreme Court in any action or proceeding brought to such court by writ of error, bill of exceptions, or appeal from a decision, judgment, or decree rendered by him as a Judge of the District Court." In Nephi Irrigation Co. v. Jenkins, 8 Utah 452, it was held that under that act any three of the Justices constitute a quorum for the transaction of business, and a Justice who tried the case below might sit for the purpose of making a quorum, but could not act or participate in such proceeding. In Pennsylvania, but not under a constitutional

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provision like ours, the Supreme Court of that state in Commonwealth v. Mathews, 210 Pa. St. 372, held that where one or more of the Judges of a court decline to sit in a case by reason of personal interest in the result, the powers of the court necessarily devolve on the remaining Judges, even if only a minority of the court. In the present case, a quorum of the court was present at the hearing and decision of the cases and the decision was by a majority of the Judges who sat and heard the cause, and is valid. A rehearing is denied.

Rehearing denied.

POTTER and BLYDENBURGH, JJ., concur.

ROHRBAUGH v. MOKLER.

(No. 956; Decided March 29, 1920; 188 Pac. 448.)

DEDICATION—EVIDENCE INSUFFICIENT TO ESTABLISH—CONTRACTS—PRACTICAL CONSTRUCTION BY PARTIES—ESTOPPEL—CITY HELD ESTOPPED TO DENY VACATION—EQUITABLE ESTOPPEL—STATUTE OF FRAUDS—CITY CANNOT ATTACK ORAL CONTRACT BETWEEN PRIVATE PARTIES—RIGHTS ACQUIRED BY EXECUTED ORAL CONTRACT ARE NOT AFFECTED BY STATUTE OF FRAUDS—EVIDENCE—PROCEEDINGS OF A CITY COUNCIL NOT RECORDED MAY BE PROVED BY PAROL.

1. Where a town plat showed a triangular piece of land at the intersection of three streets, not numbered or in any way designated as a street, alley, or public ground, and the town had never attempted to exercise ownership over it, and had recognized a claim of private ownership, the evidence does not establish a dedication to the public.
2. Where the meaning of a contract or other written instrument is doubtful on its face, the practical construction put on it by the parties has great weight, especially where they have for a long time acquiesced in and acted in good faith on such practical construction.
3. Where a town, in consideration of a lot owner's waiver of his rights under a contract to another tract of land, vacated, under the authority of Rev. Stat. 1899, 1545, Par. 4, a part of the street in front of his lots, and had built a public library on the property surrendered by him, so that

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it could not restore his former situation, it is estopped to deny the validity of the vacation of the street.

4. The doctrine of equitable estoppel applies to municipal corporations in their acts with regard to the streets, though title to a street cannot be acquired by prescription.
5. Where evidence of facts necessary to establish an estoppel was admitted without proper objection, appellee may rely on estoppel, though he did not plead it, if his pleading might have been amended at the trial to allege the estoppel.
6. Where a city vacated a part of a street, in consideration of the surrender by the adjoining owner of his rights under an oral contract, which the lot owner and the other party treated as valid, the city cannot thereafter attack the validity of that contract.
7. Where an oral contract creating interests in land has been carried into effect, and each party has gone into possession thereunder, the rights so acquired are not affected by the statute of frauds.
8. Where no record was made of city council proceedings at which the rights of the parties were settled, those proceedings can be proved as against the city by parol, though a record thereof could not be contradicted by parol, since the city is estopped from claiming any advantage by its failure to perform its duty to record council proceedings.

ERROR to the District Court, Natrona County; HON. CHARLES E. WINTER, Judge.

Action by A. J. Mokler, against E. P. Rohrbaugh, Mayor of Town of Casper, now City of Casper, and others. There was a decree for plaintiff and defendants bring error.

W. H. Patten, for plaintiff in error.

The court erred in admitting opinion evidence as to the necessity, condition or width of a street (5 Ency. Ev. 681). The map and dedications in evidence indicate an intention that the lands should be dedicated as a street intersection (Strong v. Pritchett, 61 Northeastern 973; Atlas Lumber Co. v. Quirk, 135 Northwestern 172; London, San Francisco Bank v. Oakland, 90 Fed. 691; Arnold v. Weiker, 40 Pac. 901). Defendant had burden of proof of vacation (McQuillin, Sec. 1417); there was no record proven of council proceedings authorizing exchange of property; council could not sell a street (St. Paul, Chicago, M. & L.

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R. R. Co., 68 N. W. 459; San Francisco v. Itsell, 22 Pac. 74; McQuillin, 1141; C. B. & Q. R. R. Co. v. Quincy, 27 N. E. 192; Hoadley v. San Francisco, 12 Pac. 125; Elliott, Sec. 942). Council cannot do indirectly what it cannot do directly (Elliott, Sec. 1188; Field v. City, 124 N. W. 496; City v. Co., 34 N. W. 197; Town v. Imp. Co., 80 Pac. 549; McQuillan, Sec. 1335; City v. Tichnor, 53 N. W. 561). In any event the attempted action of the city was *ultra vires* (McQuillan, 1172; State v. Murphy, 31 S. W. 784; Co. v. City, 91 N. W. 1081; City v. Martin, 68 S. W. 605; State v. Martin, 34 S. W. 51); defendant did not plead estoppel and the defense is not available (Nance v. Ins. Co., R. C. L. 149; Lumber Co. v. Barth, 93 Pac. 38). The essentials of equitable estoppel are lacking (16 Cyc. 738; City v. Luney, 61 N. E. 1036; City v. Niloon, 53 N. W. 561; Shirk v. Chicago, 63 N. E. 192; Russell v. City, 65 N. W. 1088; Rolston v. Weston, 33 S. W. 326; Wolfe v. Town, 32 N. E. 1017; Elliott, Sec. 1189; City v. Nesler, 37 N. E. 956; Wetherspoon v. City, 13 S. E. 844; Trust Co. v. Wagner, 40 Pac. 764). The plat offered in evidence shows intention to dedicate the ground to public use.

M. W. Purcell, for defendant in error.

Defendant in error claims under a contract with the city, made in good faith and acquired possession thereunder; the city is estopped (C. R. I. & P. R. Co. v. Joliet, 79 Ill. 26; Lee v. Town, 8 N. E. 763; Joliet v. Werner, 46 N. E. 780). The land surrendered to Mr. Mokler had been vacated by action of the council; failure of the council to make a record thereof cannot operate to the prejudice of Mr. Mokler; the town had authority to vacate the street (Laws 1901, ch. 34, sec. 1 and 2; Ponischil v. Co., 83 Pac. 317; Glasgow v. St. Louis, 107 Mo. 198; 17 S. W. 743); the contention that all vacant ground left unplatted by owners who filed original plat, was dedicated to the town, is unsound. Mokler acted in good faith and having performed all requirements of his agreement with the city, is entitled to equitable relief.

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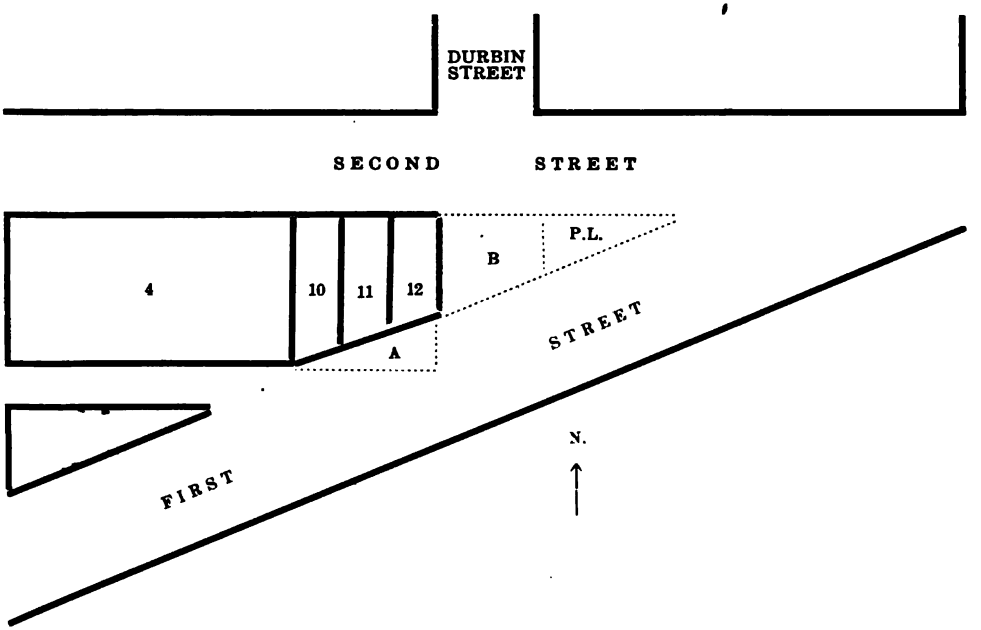
BEARD, CHIEF JUSTICE.

In this case the plaintiffs in error were enjoined by the District Court from interfering with defendant in error in his possession of a small triangular piece of land adjoining certain lots owned by him in the town, now city, of Casper. From that decree plaintiffs in error bring the case to this court by proceedings in error.

The situation can be best understood by reference to the following plat which is a substantial copy of that part of the original plat of said town in which the subject of this suit is situated. The streets are eighty feet wide, and the full lots



are twenty-five feet by one hundred feet. The unbroken lines represent the street and block lines as they appear on the recorded plat. Lots 10, 11 and 12, in block 4, are, and have been since September 5, 1901, owned by Mokler. The small triangular piece of land marked "A" is the land involved in this action. The triangle marked "B" is not numbered or in anywise designated on the original plat either

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as street, alley, or public ground. The small end of this triangle marked "P. L." is occupied by a "Carnegie" library now under the control of the county. In 1904, J. M. Carey, who claimed to own the triangle "B", gave to Mokler a contract for, or option to purchase this ground. During that year, the town or city, whichever it then was, desired to procure ground for a park and library site, and requested Judge Carey to donate to it said land, which he expressed a willingness to do, but could not on account of his contract with Mr. Mokler. Mokler desired to secure the triangle "A" in order to square up his lots. At a meeting of the town or city council, at which Mr. Mokler was present, it was agreed that he should surrender his contract with Carey and that he should be granted the triangle "A" in consideration therefor. No record seems to have been made on the town records of this transaction, nor was it evidenced by any writing. The town or city took possession of the tract "B", extended or at least opened Durbin Street south to First Street, established a park, of which the triangle, P. L., is a part, vacated First Street south of P. L. and that part of the street enclosed in "A", and erected the library building. Mokler took possession of "A", fenced it, erected some buildings thereon, built a cement sidewalk about it, the grade for which was given him by the city or town engineer, and has ever since been in the exclusive possession thereof, claiming to be the owner. We think the evidence is sufficient to sustain the foregoing statement of the facts.

The city threatened to take possession of the triangle A, and to remove or destroy the improvements Mokler had placed thereon, and to arrest him for obstructing the street, whereupon he brought this action, with the result stated. A number of errors are alleged, for which it is urged the judgment should be reversed. It is claimed that the plat shows that the triangle B was dedicated to the public, and, therefore, neither Carey nor Mokler could have any interest in or title to it. The plat was filed for record February 7, 1889, but the record does not disclose when the town of Casper was incorporated, or when or how Carey became

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the owner of said tract. It does appear, however, that the town never attempted to exercise any control over any part of the triangle B, and recognized Carey's ownership and right to the possession of the same. It applied to him to donate it to the town as a part, at least, of a library site and public park. Whatever doubt might arise from the plat alone as to the intention of the dedicator with respect to this tract, we think is removed by the subsequent acts and conduct of the parties. It is well settled that if the meaning of a contract or instrument is doubtful on its face, the practical construction put upon it by the parties should have great weight in determining its proper construction (J. W. Denio Milling Co. v. Malin, 25 Wyo. 143, 165 Pac. 1113; Johnson v. Gibson, 78 Ind. 282; Willcuts v. The Northwestern Life Ins. Co., 81 Ind. 300). That rule is applicable to a case of the character which we are now considering (Goode v. The City of St. Louis, 113 Mo. 257, 275, 20 S. W. 1048; The City of Noblesville v. The Lake Erie and Western Railroad Co., 130 Ind. 1, 29 N. E. 484). This is especially true where the parties have for a long time acquiesced in and acted, in good faith, upon such practical construction. Upon the evidence in the record we are of the opinion that the triangle B was not dedicated to the public either as streets or other public grounds. The town council was invested with authority to vacate streets (Par. 4, Sec. 1545, R. S. 1899), that being the statute in force at the time that part of First Street included in the triangle A was vacated. Having vacated that part of the street, and having given Mokler possession and permitted him to remain in possession and to place improvements thereon, and having taken possession of the triangle B and devoted it to public purposes so that it cannot restore Mokler to his former situation, we think the city is estopped from now repudiating the transaction. It may be conceded that title to a street cannot be acquired by prescription, and that mere possession for the statutory period of limitations will not ripen into title. But, as held in many states, the doctrine of equitable estoppel applies to municipal corporations. In

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discussing the question, Judge Dillon, in 2 Dill. Mun. Corp., 2nd ed., sec. 533, said: "There is no danger, in recognizing the principle of an equitable estoppel *in pais* as applicable to such cases, as this leaves the court to decide the question, not by the mere lapse of time, but by all the circumstances of the case, to hold the public estopped or not, as right and justice may require." In support of the rule thus stated by Judge Dillon, we cite, but without quoting therefrom, the following authorities: Baldwin v. Trimble, 85 Md. 396, 37 Atl. 176, 36 L. R. A. 489; Van Tobel v. City of Lewiston, 41 Mont. 226, 108 Pac. 910, 137 Am. St. Rep. 733; The People v. Wiebald, 233 Ill. 572, 84 N. E. 646; Blennerhassett v. Town of Forest City, 117 Ia. 680, 91 N. W. 1044; Jordan v. City of Chenoa, 166 Ill. 530, 47 N. E. 191; C. R. I. & P. R. R. Co. v. City of Joliet, 79 Ill. 25; Burroughs v. City of Cherokee, 134 Ia. 429, 109 N. W. 876. In the present case the equities are much stronger in favor of Mokler than in many of the cases cited. He has not only been in possession of the land in controversy for more than the period of limitations, but his possession was also by and with the express agreement of the town authorities who had vacated that part of the street, and is not able to restore him to his former situation. It is contended that an estoppel was not sufficiently pleaded. But the evidence of the facts necessary to constitute an estoppel was admitted without proper or valid objection, and the pleading might have been amended to conform to the facts proven; and such an amendment would not have amounted to a change in the cause of action (Kuhn v. McKay, 7 Wyo. 42, 49 Pac. 473, 51 Pac. 205).

It is argued that Mokler's contract with Carey was void, not being in writing. A sufficient answer to that is, that the undisputed evidence is that both of them regarded it as valid and neither of them sought to avoid it for that reason. It is also urged that the agreement between the town and Mokler was void because not in writing. But the rule is well settled that, "where oral agreements creating interests in land have been carried into effect by the acts of the par-

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ties, the rights acquired thereunder are not affected by the statute" (20 Cyc. 303, and cases cited in note). In this case the agreement for the exchange was fully consummated and each party went into possession under the agreement and has so continued in undisturbed possession for about twelve years.

The fact that the transaction between the town and Mokler was not made a matter of record, cannot defeat the latter's rights. In 2 Dill. Mun. Corp., 5th ed., sec. 557, it is said: "But a distinction has sometimes been drawn between evidence to contradict facts stated on the record and evidence to show facts omitted to be stated upon the record. Parol evidence of the latter kind is receivable unless the law expressly and imperatively requires all matters to appear of record, and makes the record the only evidence. Thus, in a well considered case in the Supreme Court of the United States, it was held that the acts of a corporation might be proven otherwise than by its records or some written document, even although it was its duty 'to keep a fair and regular record of its proceedings'. The statute did not prescribe that nothing but a record vote or written document should bind the corporation or be received in evidence. Such written evidence was not deemed indispensable unless positively required. The direction to keep a record was regarded as directory." (See also Section 558, and notes; 28 Cyc. 343, 19 R. C. L. 903 and 7 A. & E. Ann. Cas. 1046.) The failure to make a record of what was actually done at the meeting of the town council being the fault of the officers of the town, the town is estopped from claiming any advantage by reason of such omission; and parol evidence was properly admitted in this case to prove what was actually done.

Upon the whole record, we think the equities of the cause are in favor of Mokler, and that no prejudicial errors occurring on the trial have been shown; and that the decree is sustained by sufficient evidence. The decree of the District Court is, therefore, affirmed. *Affirmed.*

POTTER and BLYDENBURGH, JJ., concur.

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WYOMING CENTRAL IRR. CO v. LAPORTE.

(No. 943; Decided March 29, 1920; 188 Pac. 360.)

PARTIES—ACTION ON COST BOND—COSTS DEPENDENT ON STATUTE—INTEREST—TAXABLE COSTS A PART OF JUDGMENT—JUDGMENT FOR COSTS DRAWS INTEREST—EXECUTION—WRIT MUST BE ISSUED FROM COURT RENDERING JUDGMENT—EXECUTION NOT ISSUABLE FROM COUNTY WHERE MERELY TRANSCRIPTED.

1. Under Comp. Stat. 1910, 4311, 4312, where no one except defendant in the action had any claim on the security of plaintiff's bond for costs, and the judgment in her action on such bond adjudged costs to her alone, it would have been useless to have brought other defendants named in in the bond as obligees into the case as parties, and plaintiff and his surety on the bond cannot complain of any defect of parties plaintiff.
2. In view of its language and the statute under which it was given, plaintiff's cost bond held to have covered judgment for costs in favor of defendant on her cross-petition.
3. The question of costs is purely statutory, as they were not allowed as a rule at common law.
4. At common law no interest was allowed on judgment; such matter being strictly statutory.
5. Costs taxable as part of the judgment in favor of the prevailing party are part of the judgment and an incident thereto.
6. Under Comp. Stat. 1910, 3357, relative to interest on judgments and decrees, and chapter 304, as to costs, a judgment for costs in favor of the prevailing party draws interest.
7. Execution must be issued by the clerk of the court rendering the judgment.
8. Under Session Laws 1911, c. 22, authorizing filing of transcript of judgment in office of clerk of county other than where it was rendered, to make it a lien on the property of the judgment debtor in such county, no power exists in clerk of court in which transcript is filed to issue execution, such authority not being expressly conferred, and an execution so issued is void. The clerk of the court of the county where the judgment was rendered should issue execution, as authorized by Comp. Stat. 1910, 4668.

ERROR to the District Court, Fremont County; HON. CHAS. E. WINTER, Judge.

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Action by Nina A. LaPorte, upon a cost bond, against the Wyoming Central Irrigation Co. and the National Surety Co. There was a judgment for plaintiff and defendants bring error.

P. B. Coolidge and *Edward H. Stearns,* for plaintiff in error.

A judgment creditor is not entitled to interest on that part of his judgment which covers the costs (O'Donnell v. Co., 48 N. W. 880; McManus v. Burrows, 177 S. W. 671; Baum v. Reed, 74 Pa. 320; Ashworth v. Trammell, 47 S. E. 1011; De Lizardi v. Hardaway, 8 Rob. (La.) 20; Hill v. White, 1 N. J. Eq. 435; McCausland v. Bell, 9 Serg. & R. 388; Parrott v. Thompson, 19 Wkly. Notes Cas. 548; Miller v. Hottenstein, 1 Woodw. 236; Ghent v. Boyd, 43 S. W. 891; People's Bank v. Ins. Co., 76 Fed. 548). Even though the allowance of interest upon judgments generally is provided by statute (Rogers v. Burns, 27 Pa. St. 525; Gatewood v. Palmer, 10 Humphr. Tenn. 466). There was no evidence that defendant had paid the costs but showing that she had merely incurred them; interest is not recoverable on a bond in excess of penalty (People's Bank v. Campan, 82 N. W. 803; Fraser v. Little, 13 Mich. 195; St. Louis Bd. of Educ. v. Co., 82 S. W. 70; State v. Sandusky, 46 Mo. 377; Farrar v. Christy, 24 Mo. 453; Co. v. Seago, 38 S. E. 805; Warden v. Neilson, 5 N. C. 275; Stroble v. Large, 14 S. C. L. 112; Rhea v. McCorkle, 11 Heisk (Tenn.) 415; State v. Blakemore, 7 Heisk 638; Louisville Elec. Co. v. Co., 148 S. W. 671). The sheriff is not entitled to commission on an execution sale, where the property is bid in by the judgment debtor (Berry v. Kiefer, 133 Pac. 1126; Soderberg v. King County, 45 Pac. 785; Peery v. Wright, 45 Pac. 46, and cases there cited). Sheriff's fees are taxable only in accordance with some statute (Smith v. Williamson, 11 N. J. Law 313; Grofut v. Brandt, 58 N. Y. 106; O'Connor v. O'Connor, 47 N. Y. Super. 498; Biggerstaff v. Cox, 46 N. C. 536; Spencer v. Peterson, 68 Pac. 519: Day v. Rutledge, 12 Man. 451; Hudson v. Co., 68

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N. Y. Supp. 28; Eagan v. Finney, 72 Pac. 133; Meree v. Beilfeld, 194 Ill. App. 364). A sheriff is allowed $1.50 for advertising property for sale (42 N. J. L. 211). Costs incurred in execution proceedings are not recoverable against judgment debtor unless taxed and approved by court order (Hawkins v. Mumford, 5 Denio 355; Gerard v. Caruolo, 61 Alt. 599; Gardner v. Brown, 22 Ind. 447; Beeman & Cashin Co. v. Sorenson, 15 Wyo. 450; 89 Pac. 745; Fletcher v. Norrell, 44 N. W. 133). Sheriff is without authority to tax costs; only the court where judgment is entered may issue execution (1 Freeman Ex. 13); where a transcript is filed in another county under a statute the purpose being to make the judgment a lien, execution issued out of that county is void (Seaton v. Hamilton, 10 Ia. 394; Furman v. Dewell, 35 Ia. 170; Shattuck v. Cox, 97 Ind. 242; Bostwick v. Benedict, 4 S. D. 414; Williamette Co. v. Hendrix, 28 Ore. 485; Lovelady v. Burgess, 32 Ore. 418; 52 Pac. 25; Bank v. Miller, 40 So. 513). Proceeds of an execution sale must first be credited to costs, and secondly upon the amount of the judgment (Baldwin v. Hatch, 54 Me. 167; Dean v. Baily, 12 Vt. 142; Beeman v. Sorenson, 15 Wyo. 450; 89 Pac. 745; McNeil v. Bean, 32 Vt. 429). The cost bond judgment covered costs in favor of defendant on her cross-petition. Plaintiff prevailed in the action in which the bond was given so that no recovery should be allowed on the bond (Hunter v. Robertson, 37 So. 771; Cook v. Dennis, 52 So. 560; Gilly v. Hirsh, 42 So. 422, 20 L. R. A. N. S. 972; Boothe v. Cowan, 5 Sneed Tenn. 354; Ontario Co. v. Co., 17 Ont. Pr. 156; Powell v. Montgomery, 8 Sask. L. 224; Shrapnell v. Long, 20 Q. B. D. 334). Sureties are only chargeable according to the strict terms of the bond (Robinson v. Epping, 4 So. 812; Ovington v. Smith, 78 Ill. 250; Field v. Rawlings, 6 Ill. 581; Butte v. Bennetts, 149 Pac. 92; Lang v. Pike, 27 Ohio St. 498; Co. v. Louderbach, 69 Atl. 673, 16 L. R. A. N. S. 775). Action on the cost bond was prematurely brought, since the main action is pending on appeal (Curtiss v. Beardsley, 15 Conn. 518). Action on a judgment should not be maintained in the absence of some

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special and adequate cause therefor (Moss v. Shannon, 1 Nilt. (N. Y.) 175; Goodrich v. Barney, 2 Vt. 422; Beckham's Succession, 16 La. Ann. 352; Wood v. Newberry, 48 Mo. 322; Keeler v. King, 1 Barb. (N. Y.) 390; Pitzer v. Russel, 4 Ore. 124; Ligon v. McNeil, 6 Rich. (S. C.) 377; McClenahan v. Cotten, 83 N. C. 332; Cole v. Mitchell (Wisc.), 45 N. W. 948).

No brief was filed for defendant in error.

BLYDENBURGH, JUSTICE.

This case was brought on an undertaking given to secure costs on a change of venue in the case of Wyoming Central Irrigation Company, a corporation, plaintiff, v. Nina A. LaPorte, William M. Mooney, C. P. Twitchell and Riverton State Bank, a corporation, in accordance with the provisions of section 5144 of the Wyoming Compiled Statutes of 1910. A change of venue was had in said original action to Natrona County and the trial there resulted in a judgment for the defendant, Nina A. LaPorte, the plaintiff in this case, against the plaintiff in that case, The Wyoming Central Irrigation Company, one of the defendants in this case, and for the costs taxed at $131.60. A transcript of this judgment was filed in the office of the Clerk of the District Court of Fremont County under the provisions of Chapter 22 of the Session Laws of 1911 and Nina A. LaPorte caused an execution to be issued by the Clerk of the District Court of said Fremont county upon said transcript and placed in the hands of the sheriff of Fremont county for service. That said sheriff levied upon certain interests of the Wyoming Central Irrigation Company in a certain ditch and water right, advertised it for sale in the usual manner and sold the same for $6,668 to Nina A. LaPorte, the judgment and execution creditor, and filed the return of the execution with the Clerk of Court of Fremont County, showing his costs to be: To the Riverton Review, for publishing notice of sale, $319.58; sheriff's costs and commissions, $93.93; a total of $413.51. This suit on the cost bond is brought to recover the $131.60 costs taxed in the original judgment in

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Natrona county and interest thereon from Oct. 30, 1914, the date of said judgment, at 8% per annum, and for the balance of the $500 penalty of the undertaking, to-wit: $369.40, being a part of the costs incurred on the execution in Fremont county with 8 per cent. per annum from April 28, 1916, the date of the sale of the ditch under the execution. The case was tried by the court without a jury and judgment rendered in favor of the plaintiff and against the defendants for the sum of $585.10, and $6.40 costs, to which the defendants excepted, filed a motion for a new trial, which was overruled, an exception taken, and the case is brought here on error.

The petition in error contains eleven different specifications of error, which as argued in the brief may be stated as follows:

1st. That a judgment for costs does not draw interest and interest should not have been allowed on the $131.60 costs taxed in the original judgment.

2nd. That interest is not recoverable on a bond such as the one sued on in excess of the penalty of $500.

3rd. The sheriff is not entitled to commissions on an execution sale of property where the property is bid in by the judgment creditor.

4th. The item of $319.58 to the Riverton Review for publishing notice of sale was excessive and not allowable as costs to any amount by which the same exceeded $1.50.

5th. The $431.51 costs alleged to have been incurred in connection with the execution have never been taxed and are not recoverable against the judgment debtor or its surety until taxed and approved in some manner by the court.

6th. The item of $413.51 as costs on the execution is an improper charge because the execution not being issued out of the court in which judgment was obtained is void and all proceedings thereunder are void.

7th. If the execution and sale were valid the $6,668 realized therefrom must be credited first on the expense of the execution wiping out the $413.51 and 2nd on the costs

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taxed in the original judgment and 3rd on the net amount of the damages in the original judgment.

8th. The bond sued on did not cover any judgment for costs in favor of defendant on her cross-action.

9th. That William M. Mooney, C. P. Twitchell and Riverton State Bank should have been joined with Nina A. LaPorte as plaintiffs as they are all obligees in the bond, and therefore the demurrer on the ground that there is a defect of parties plaintiff interposed by defendants in the court below should have been sustained.

10th. That the suit was prematurely brought as the original case was in the Supreme Court undetermined at the time this suit was tried in the District Court.

From the view we take of the case, it will not be necessary to consider in detail each of these alleged errors nor will we consider them in the order presented by counsel in the brief, but will take up those we consider necessary for a full decision of the case in what seems to us the logical order.

The 9th error claiming that there is "a defect of parties plaintiff" while it might have been good at common law, is answered by the provisions of the Code, sections 4311 and 4312, of Wyoming Compiled Statutes, 1910, providing that an action must be prosecuted in the name of the real party in interest and that "anyone entitled by law to the benefit of the security may bring an action thereon in his own name." The petition in this case alleges that no one except Nina A. LaPorte had any claim upon the security of the bond sued upon and the judgment of the Natrona County District Court adjudged costs to her alone. Under these circumstances it would have been useless to have brought the other named obligees of the bond into the case. The case of Curry v. Homer et al., 62 O. St. 233, 56 N. E. 870, was upon a supersedeas bond given to defendants in error for value of use and occupation of the premises "and pay all costs that have accrued or may accrue in the Supreme Court" and it was held although the plaintiff Curry was not one of the obligees of the bond, he being the owner by assignment of all the costs, he was entitled to sue and re-

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cover on the bond notwithstanding the surety and principal had made settlement of the bond with the defendants in error. This case is particularly applicable as our statutes 4311 and 4312, *supra,* were taken from Ohio.

In regard to the 8th claim of error that the bond sued on did not cover any judgment for costs in favor of the defendant on her cross-petition, this is answered by the language of the bond and the statute under which it is given. The condition of the bond reads: "NOW, THEREFORE, If the above bounden Wyoming Central Irrigation Company, the plaintiff in the above entitled cause, shall pay all costs that may be adjudged against it in said cause, then this obligation to be void;" and the language of the statute as to the condition of the undertaking is "that he will pay all costs that may be adjudged against him in such cases." There can be no doubt that the costs to the amount of $131.60 was adjudged against the plaintiff in the cause in the Natrona county court and is within the letter of the bond. If there was any error in the adjudication or taxation of costs that should have been corrected in that court by a motion to retax costs but cannot be thus collaterally attacked in this case.

The first error claimed is that a judgment for costs does not draw interest. This is a question which has not been before or decided by this court and one upon which attorneys practicing before our courts have differed, and upon which, at first blush, there would appear to be conflict of authority. The question of costs is a purely statutory one and costs were not allowed as a rule at common law (7 R. C. L. 781), so also no interest was allowed on judgments and that matter therefore is strictly statutory. So the whole subject depends on the wording and construction of the statutes applicable thereto and to a large extent the apparent diversity of opinion in various states is due to the different wording of the statutes. Our statutes applicable are, 1st, Section 3357, Compiled Statutes of Wyoming, relating to interest on decrees and judgments, which reads as follows:

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"Interest on all decrees and judgments for the payment of money shall be, from the date of the rendition thereof, at the rate of eight per cent. per annum, until the same shall be paid; Provided, That if said judgment or decree shall be founded upon any contract, either verbal or written, by the terms of which a less rate of interest than eight per cent. shall have been agreed upon, the rate of interest upon such judgment or decree shall be the same as provided for by the terms of the contract upon which the same is founded."

And under the various provisions of Chapter 304, costs are generally allowed to be taxed as part of the judgment in favor of the prevailing party except in certain cases where the amount of the damages recovered is small as provided in Section 4645. Such costs are part of the judgment and an incident thereto (15 R. C. L. 578; Saunders v. Manufacturing Co., 27 Mich. 522). There does not seem to be any good reason why a judgment for costs should not draw interest as well as a judgment for damages. Interest is in the nature of damages for the withholding or depriving one of the use of money. This is especially true under our statutes where the theory of the law at least is that the party to whom is awarded costs has paid them in money or its equivalent, and when the officers, sheriffs, clerks, &c., have a right to demand the payment of all fees for their services in advance and the Clerk of Court is made responsible on his bond for the collection of fees. A judgment for the payment of money under the terms of section 3357, *supra*, draws interest and a judgment for costs is certainly a judgment for the payment of money. In the case of Palmer et al. v. Glover, 73 Ind. 529, on page 532, the Indiana statute is quoted as follows:

"Interest on judgments for money, hereafter rendered, shall be from the date of the return of the verdict or finding of the court, until the same shall be satisfied, at the rate per cent. agreed upon by the parties in the original contract, not exceeding six per cent., and if there is no contract by the parties, at the rate of six dollars a year on one hundred dollars."

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And then on the same page the court says:

"It is settled by the decisions of this court, that 'the costs recovered by the judgment are due to the judgment plaintiff, and it is his right to control and receive the money so recovered'; and that 'a judgment in favor of a party for costs is, therefore, as much his own property and under his own control as a judgment for a debt sued for' (Armsworth v. Scotten, 29 Ind. 495; Hays v. Boyer, 59 Ind. 341; Miller v. The State, ex rel., 61 Ind. 503; and Goodwin v. Smith, 68 Ind. 301). If a judgment for costs is a 'judgment for money', and it surely is, then, by the express terms of the statute, it bears interest 'from the date of the return of the verdict or finding of the court, until the same shall be satisfied'; and the judgment plaintiff, in an action upon his judgment, is as much entitled to recover interest upon his judgment for costs as he is upon his judgment debt."

In the case of Linck v. City of Litchfield, 31 Ill. App. 105, in which the only question involved was whether a judgment for costs bears interest, the court said:

"The question whether a judgment for costs bears interest, has not been passed upon by the courts of this state, so far as we are advised. Sec. 3, Chap. 74, R. S., provides, 'Judgments recovered before any court or magistrate, shall draw interest at the rate of six per centum per annum, from the date of the same until satisfied'. If the adjudication of a court in awarding costs is a judgment within the meaning of the foregoing section, there would seem to be no room to question the propriety of allowing interest upon costs so recovered and allowed. * * * It is true the clerk is the officer authorized by law to tax the costs and determine the items and their amount, but when this is done, such taxation relates back to, and is supported and authorized alone by the decision of the court in rendering a judgment for the costs, and is as much the judgment of the court as the damages awarded. We are inclined to think, therefore, that a judgment for costs is within the language and meaning of Sec. 3 of the chapter on interest, and that the Circuit Court erred in holding differently."

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In Hayden v. Hefferan, 99 Mich. 262, 58 N. W. 59, the court said: "How. Stat., § 7672, provides that, when execution shall be issued upon any judgment, interest on the amount of the same, until such amount is paid, shall be collected thereon. A judgment for costs is as much a judgment as any other, and is therefore within the terms of the statute."

In Padley v. Catterlin, 64 Mo. App. 629, on motion for rehearing where the question of allowing interest on costs was raised, the court, on page 648, said: "Besides this, the defendant had the use of plaintiffs' money, or, which is the same thing as far as plaintiffs are concerned, he deprived the plaintiffs of the use of it, and for that reason, if for none other, plaintiffs were entitled to interest (Webster v. Railroad, 116 Mo. 114)."

In the case of Emmitt v. Brophy, 42 O. St. 82, the Supreme Court of the State of Ohio, the state from which our statute 3357, *supra,* is taken, in construing it as applied to interest on costs, says on page 93: "A liberal and rational construction, in the light of such policy, of our legislation concerning interest, lead us to the conclusion that where a party or other person is entitled to costs in any judicial proceeding, which have been adjudged, ordered to be paid or for the collection of which execution is authorized, he is entitled to interest thereon from the date of the judgment or order, or from the time when execution is first authorized." To the same effect is In re. Kennedy, 94 Cal. 22, 29 Pac. 412; Kleck v. Robinson, 22 Wend. (N. Y.) 157; Richey v. Carpenter, 2 Wash. 512, 28 Pac. 380; cases cited in 22 Cyc. 1520, note 34.

Only two cases are called to our attention in plaintiff in error's brief holding where interest on judgments are allowed generally that interest should not be allowed on judgments for costs, one a Pennsylvania case decided in 1856, and the other a Tennessee case decided in 1850, both mentioning and following the common law rule that interest on costs are not allowable. Under statutes such as ours, by reason as well as the weight of authority, interest on judg-

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ments for costs should be allowed as well as upon judgments for damages.

We will next consider the claim No. 6, *supra,* that the whole item of costs incurred in connection with the execution in Fremont county being issued on a transcript filed in Fremont county of the judgment rendered in Natrona county are not recoverable against the bond. It is the general rule that an execution must be issued by the clerk of the court rendering the judgment (17 Cyc. 986, 10 R. C. L. 1219). The object of the statute, Chapter 22, Session Laws 1911, under which the transcript of the Natrona county judgment was filed in the office of the Clerk of Court of Fremont county is for the purpose of making it a lien upon the property of the judgment debtor in Fremont county and to notify prospective purchasers of such lien. This statute is as follows:

"Section 1. The judgment creditor in any judgment rendered by the District Court in and for any county in this state, or in any judgment of the court of the Justice of the Peace of this state, duly filed in the judgment records of such District Court, may file a transcript of such judgment record of such District Court in the office of the Clerk of the District Court in any or all other counties within this state where the judgment debtor owns real estate. Such judgment shall become a lien upon all real estate of such judgment debtor in such county where such transcript is filed, from the date of filing of such transcript in such county. The Clerk of the District Court of any such county in which said transcript is filed shall enter the same upon the judgment records of such court in like manner as judgments rendered in such court."

It is evident that this statute is merely for the purpose of making the judgment a lien upon the judgment debtor's real estate in the other county and contains no authority to the clerk of the court in which the transcript is filed to issue an execution thereon. It is held that no power exists in the clerk of the court in which the transcript is filed unless such authority is expressly conferred by statute, and

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executions so issued are void (Freeman on Executions, 3rd ed., Sec. 14, pp. 40 and 41; Sec. 15, p. 44). In Seaton & Son v. Hamilton & Co., 10 Ia. 394, this being the very question at issue, the court said:

"The Clerk of the District Court of Boone County had no authority to issue an execution upon the transcript thus filed. It does not appear that the transcript was docketed and indexed as provided by law, and we think that the law does not confer any power upon such clerk to issue an execution. He has no such authority unless it is expressly given to him by some statutory enactment. * * * The object of the provision of this chapter, is to give to the judgment plaintiff a lien upon any real estate of the defendant in the county where such transcript may be filed, and to operate as a notice to purchasers subsequent to the filing thereof. This chapter provides 'that judgments of the District Court, of the Supreme Court and of the District Court of the United States, become liens by the filing of copies thereof, as described in this chapter. The clerk shall docket and index the same as though the judgment had been rendered in this court." The law does not declare that such filing, indexing and docketing shall have the effect of a judgment rendered, it merely becomes a lien. The judgment creditor has a full remedy by the statute which confers upon him the right to issue an execution from the county where the judgment was rendered to any county in the state."

In Furman v. Dewell, 35 Ia. 170, on the same question the court said: "Plaintiff's judgment, on which the land was sold, was rendered in Lin county, Iowa, a transcript thereof filed in Harrison county, and the execution, by virtue of which the sale was made, issued from the clerk's office of the latter county. The Clerk of the District Court of Harrison County possessed no authority to issue the execution, and the writ conferred no authority on the sheriff to levy and sell, and all the proceedings under it were void. Execution in such cases must issue from the county where the judgment was rendered (Rev., §§ 3248, 3249; Seaton v. Hamilton, 10 Iowa, 394)."

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In Shattuck v. Cox, 97 Ind. 242, the court said:

"The statute authorizes the transcript of a judgment to be filed in the office of any clerk of the Circuit Court in this state, and from the time of such filing the judgment becomes a lien upon the real estate of the judgment debtor in the county in which the transcript is filed (Sections 610 and 611, R. S. 1881). As to a judgment rendered before a justice of the peace, the statute authorizes the issue of an execution, in certain cases, by the clerk of the court where the transcript is filed (Sections 612, 613 and 614, R. S. 1881). But as to other judgments the execution must issue from the court in which they were rendered (2 Works Pr., section 1141; Freeman Ex., sections 10 and 15). The issue by the clerk of the Vigo Circuit Court of the execution upon the transcript of the judgment rendered in the Sullivan Circuit Court, was without authority of law. The execution and the sale thereunder were void."

In Bostwick, et al., v. Benedict, 4 S. D. 414, 57 N. W. 78, the Supreme Court of South Dakota said on this question:

"Section 5104, Comp. Laws, provides that a transcript of the original docket of a judgment may be taken from the county in which the judgment was rendered, and filed in the office of the Clerk of the Circuit Court of any other county, and that it shall then be a lien upon any real estate of the judgment debtor in said county, but this does not authorize the clerk of such county to issue execution thereon. Execution may be issued to the sheriff of any county where the judgment is docketed (Section 5114), but it must be issued from the county where the judgment was rendered. This is the evident plan of our statute. In some states the statute expressly authorizes an execution to issue from any county in which a transcript is filed, but ours does not, and the power does not exist without statutory authority (Freem. Ex'ns, § 14). The object of our statute in allowing the filing of a transcript in another county is, as stated in said section 5104, to make the judgment a lien upon the debtor's real estate in such county. It confers no authority upon the clerk of such county to issue execution, and any attempt to

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do so is unauthorized, and the execution is void. It is so held in states having statutory provisions similar to ours (See Seaton v. Hamilton, 10 Iowa, 394; Furman v. Dewell, 35 Iowa, 170; Shattuck v. Cox, 97 Ind. 242)."

In Williamette Real Estate Co. v. Hendrix, 28 Ore. 485, 42 Pac. 514, 52 Am. St. Rep. 800, the Supreme Court of Oregon said: "The sheriff's return shows that the real property was sold upon an execution issued out of the circuit court on a judgment by confession rendered in the county court. Every court has the inherent right to control its own process, and, unless authorized by law, no other court can interfere with such right (Harris v. Cornell, 80 Ill. 54). There being no statutory provision authorizing the Clerk of the Circuit Court to issue an execution out of that court upon a judgment rendered in the county court, the writ so issued must be regarded as an absolute nullity (1 Freeman on Executions, § 15; Chandler v. Colcord, 1 Okla. 260 (32 Pac. 330).)." And again in Lovelady v. Burgess, 32 Ore. 418, 52 Pac. 25:

"The rule is undoubted that, unless otherwise provided by statute, an execution can issue only from the court in which the judgment was rendered, and we have no statute modifying or destroying this rule. Section 269, Hill's Ann. Laws, authorizes a transcript of the original docket of a judgment to be filed in the office of the County Clerk of any county of the state, and requires such clerk to enter the same in the judgment docket of his county, from which time it becomes a lien upon all the real property of the party against whom the judgment was given within the county, or which he may afterwards acquire therein during the time an execution may issue on such judgment. But the only object of this section, as plainly indicated by its terms, is to give the judgment creditor a lien upon the real estate of the judgment debtor in the county where filed, and it confers no authority upon the clerk of such county to issue an execution thereon. An execution may issue at the same time to different counties (section 277, Hill's Ann. Laws), but it can issue only from the county in which the judgment was ren-

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dered. This is the uniform construction given to similar statutes by the courts of other states, and is the only one consonant with the language used. * * * It follows from these views that the execution issued by the Clerk of Douglas County on the judgment rendered in Josephine County was unauthorized by law, and the sale thereunder was void, and of no effect."

The reason for these decisions is plainly stated in Clarke v. Miller, 18 Barb. (N. Y.) 270:

"The rule is a familiar one, that judgments must be executed in those courts in which they are rendered. I do not see upon what principle the Supreme Court could assume to execute this judgment recovered in the common pleas. The Supreme Court possessed no power to award a *fieri facias* upon that judgment, and every execution that is issued by the attorney is regarded in law as awarded by the court out of which it issues just as much as if the award was made upon the record. It strikes me as a strange proceeding for the Supreme Court to award an execution to the sheriff, commanding him to collect a judgment of the county court; and I entertain no doubt but such an execution is absolutely void."

The filing of the abstract of the judgment in Fremont county made that judgment a lien on the real estate of the judgment debtor in Fremont county, but if the judgment creditor desired to have the real estate sold under execution she should have had the Clerk of the District Court of Natrona County, the court where the judgment was rendered, issue an execution to the sheriff of Fremont county as authorized by section 4668, Compiled Statutes of 1910. As the execution was absolutely void none of the costs or expenses incurred thereunder were collectible in this suit on the undertaking. As to whether such costs are covered by such an undertaking as is in suit here under a valid execution it is not necessary to decide in this case, and we do not decide.

It is not necessary to pass on the other matters raised as to the costs claimed under this void execution, but we, in

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passing, call attention to the fact that the claim in the third specification, *supra,* has been decided by this court in Lyman v. Thorn, 24 Wyo. 326, 157 Pac. 887, Ann. Cases 1918a 368, contrary to the contention of plaintiff in error. Had the execution sale in Fremont county been valid there might have been some question as to whether the proceeds of that sale would not first have to be applied on the payment of the costs awarded in the original judgment, but we do not decide this question as we hold that execution and all proceedings under it void, so these costs are still unpaid. We hold, therefore, that the costs awarded in the original case in the Natrona County Court, viz: $131.60, together with interest thereon at the rate of eight per cent. per annum from October 30, 1914, the date of said judgment, is a valid claim, and collectible from the principal and surety on the undertaking sued upon; that none of the other items being costs alleged to have accrued in the void execution in Fremont county are so collectible. That the judgment is therefore modified accordingly and the case remanded to the District Court of Fremont County with instructions to vacate its former judgment and to enter up a judgment against the plaintiffs in error and in favor of Nina A. LaPorte, the defendant in error, for one hundred and thirty-one and 60/100 ($131.60) dollars and interest thereon at the rate of 8 per cent. per annum from Oct. 30, 1914, and that each party pay their own costs in the Supreme Court.

Modified and remanded.

BEARD, C. J., and POTTER, J., concur.

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GILPATRICK v. PERRY.

(No. 948; Decided April 2, 1920; 188 Pac. 442.)

BILL OF EXCEPTIONS—PRESENTATION AFTER JUDGE OUT OF OFFICE—TIME FOR PRESENTATION—EVIDENCE—JUDICIAL NOTICE OF COURT TERMS—ORDER—EXTENSION OF TIME FOR FILING BILL OF EXCEPTIONS—REQUEST FOR EXTENSION OF TIME—APPEAL AND ERROR—EXTENSION OF 60 DAY PERIOD FOR FILING BILL OF EXCEPTIONS—TRUSTS—GUARDIAN AND WARD—WITNESSES—CROSS-EXAMINATION.

1. A bill of exceptions as to matters occurring on trial, including the findings and exceptions thereto, is properly presented to the judge who presided at trial, notwithstanding his term of office had expired.
2. Where defendant's motion for new trial was overruled on March 22nd, by the judge to whom same had been referred, the bill of exceptions as to matters occurring at trial, which was presented to the judge who had presided but had gone out of office, was within time, where it was presented May 20th, being within 60 days.
3. The Supreme Court will take judicial notice of the terms of court in the several districts.
4. As Comp. Stat. 1910, 4595, as amended by Laws 1917, c. 70, 1, has not limited the time for settling or filing of bill but only the time for reducing exceptions to writing and presenting the same for allowance, an order of the court overruling motion for a new trial and granting the defeated party time until the next term of court to prepare, settle and file bill of exceptions, must be deemed as granting time to prepare and present a bill.
5. An order, entered on the overruling of motion for new trial, which extended the time for filing bills of exceptions until the next term of court being within the power of the court under Comp. Laws 1910, 4595, as amended by Laws 1917, c. 70, 1, because the next term of court began within 80 days, is valid, although it did not expressly declare that the 60 day period allowed by statute was extended.
6. Comp. Laws 1910, 4595, as amended by Laws 1917, c. 70, 1, fixing the time for presenting bill of exceptions, and allowing the trial court to extend the same, does not require that the request for an extension shall be in writing or filed, although the judge may perhaps have the right to insist, as a condition to acting upon such request, that it be presented in the form of a written motion or application.

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7. Where the time for presenting bills of exceptions as fixed by Comp. Laws 1910, 4595, as amended by Laws 1917, c. 70, 1, is extended, it will be presumed that the order of extension, made without written application, was made upon proper request and a satisfactory showing.
8. The time for presenting bills of exceptions may be extended at the time of the final order from which under Comp. Laws 1910, 4595, as amended by Laws 1917, c. 70, 1, the defeated party would have 60 days in which to present bills of exceptions.
9. In an action by the guardian of a minor to impress a trust on real estate from the alleged unauthorized use of the minor's funds by former guardian in paying off a mortgage on real estate which had been the homestead of the minor's father, evidence held to show that the former guardian, who was the minor's mother, used her ward's property in discharging the mortgage, and hence the same should be revived as a lien.
10. Where defendants by their detailed cross-examination, as to conversations which a witness had with a person since deceased who was one of defendant's predecessors in title, made the witness their own, defendants cannot complain of the admission of such testimony against them.

ERROR to the District Court, Sheridan County; HON. C. H. PARMELEE, Judge.

Action by George W. Perry, as guardian of Dott Case, a minor, against Samuel I. and Bertha K. Gilpatrick and others. There was a judgment for plaintiff and defendants first named bring error. There was a motion filed to strike the bill of exceptions which was heard in connection with the hearing on the merits.

Camplin & O'Marr, for plaintiffs in error.

The bill of exceptions was filed within the time allowed by court order; time for filing could be extended (Laws 1917, c. 70); the motion comes too late (4 Cor. Jur. 327; Yates v. Kinney, 23 Neb. 648). The filing of briefs was a waiver of a motion to strike (Thompson v. Missouri, 15 Neb. 329). On the merits the action was to recover funds of a ward alleged to have been used by her guardian in paying off a mortgage, and to subrogate the interests of the ward to those of the mortgagee that received payment: the evidence

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is insufficient to sustain the judgment; rules of evidence relating to constructive trusts apply (3 Pom. Eq. Jur. 2028; Scadden v. Scadden, 53 Pac. 442, 39 Cyc. 26). A constructive trust cannot be established by a mere preponderance of the evidence (De Galindo v. De Galindo, 81 Pac. 279, 39 Cyc. 193; Barger v. Barger, 47 Pac. 702; Pom. Eq. Jur. 1040; Cushing v. Hueston, 102 Pac. 29); the rule applies to all implied trusts whether resulting or constructive (Pom. Eq. Jur. 1058; Guignon v. Bank, 55 Pac. 1051). The delay in asserting trust is unexplained, which is a circumstance against its establishment (39 Cyc. 637).

C. A. Kutcher, for defendant in error.

The bill of exceptions should be stricken from the files, not having been presented in time (4595 C. S., Laws 1917, c. 70); the order allowing time until the first day of the succeeding term was not in accordance with the act of 1917, fixing a 60 day period for presentation of the bill of exceptions; the 60 day period was exceeded in the present case.

As to the merits, the controversy is narrowed down to the question of the sufficiency of the evidence to sustain the decree; the record shows the decree of the court to be amply sustained by the evidence; the rule requiring clear and cogent evidence to establish a constructive trust does not aply to transactions between relatives, who, when a *prima facie* case is made against them, are required to show the good faith of the transaction (Schwartz v. Gerhardt, 75 Pac. 689). The funds of the ward were used to pay the Barr mortgage; the estate of the ward should be subrogated to the rights of the mortgagee.

Camplin & O'Marr, in reply.

An examination of the case of Schwartz v. Gerhardt, 75 Pac. 689, cited by defendant in error, has no application here, the controversy being between the guardian and persons between whom no confidential relationship exists; the Gilpatricks are purchasers of the property sought to be charged with the trust; the rule does not therefore apply.

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POTTER, JUSTICE.

This case is here on error, and has been submitted upon a motion to strike the bill of exceptions and also upon the merits. The motion will first be considered. It is moved thereby, first, to strike the entire bill, and, second, to strike that part of the bill showing a motion for new trial filed December 30, 1916, and the order of March 22, 1918, overruling the same, on the ground that the bill was not presented for allowance within sixty days after the overruling of said motion for new trial, but was presented sixty-two days thereafter without an extension of time having been applied for or granted. The facts upon which the motion must be determined are as follows:

The cause was tried without a jury in the District Court in Sheridan county, one of the counties of the Fourth Judicial District, with Judge Parmelee, the regular Judge of said District, presiding, on December 21, 1916, and judgment for the plaintiff was rendered on that day. On December 30, 1916, a motion for new trial was filed by the defendants, the plaintiffs in error here, alleging errors occurring upon the trial and in the findings and judgment. Subsequently another motion for new trial was filed by said defendants on the ground of newly discovered evidence. After the filing of the first motion for new trial, Judge Parmelee was succeeded in the office of Judge of said District by Judge Burgess, who had represented one of the parties as counsel on the trial of the cause, and on March 14, 1918, neither of said motions having been disposed of, the cause was assigned and transferred to Judge Raymond of the Seventh District "for trial, hearing and determination". Thereafter, on March 22, 1918, the first motion for new trial was presented to said court, Judge Raymond presiding, and it was on that day overruled, the defendants excepting, and by the order overruling the motion time was granted the defendants until and including the first day of the next regular term of the court in which "to prepare, settle and file their bill of exceptions herein". On May 13, 1918, Judge Raymond presiding, the court's attention was

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called to the second motion for new trial, and an order was entered overruling the same, to which said defendants excepted, and that order also granted to the defendants time until and including the first day of the next regular term of the court in which "to prepare, settle and file their bill of exceptions herein".

The bill, which includes the evidence and exceptions taken upon the trial, the findings and judgment and exceptions thereto, and also said motions for new trial, and shows the overruling of each motion with the exception thereto, was presented for allowance to Judge Parmelee on May 20, 1918, and the fact that such presentation was endorsed on the bill by Judge Parmelee over his signature as the "Judge presiding at the trial of said cause". On the same day the bill was allowed and signed by him, as such Judge, his certificate of allowance reciting that the bill was presented to him on said May 20, 1918, "within the time fixed by law"; that it "contains all the evidence offered by the parties to said action on the trial thereof and all the exceptions and objections of the parties to the rulings of the court during said trial and that all the matters and things therein set forth are true and correct". On May 23, 1918, the bill was presented for allowance to Judge Raymond, and on that day the same was signed and allowed by him, "in so far as it relates to said two motions for a new trial, the orders overruling the same, the exceptions of counsel thereto, and orders fixing date for preparing, settling and filing the bill of exceptions herein."

The statutory provisions applicable to this case upon the question of whether the bill was presented in time are found in section 4595, Compiled Statutes, 1910, as amended by section 1 of chapter 70 of the Laws of 1917. Before the section was amended, it provided that time may be given for reducing an exception to writing, but not beyond the first day of the next succeeding term. As amended, the section reads as follows:

"Section 4595. The party objecting to the decision must except at the time the decision is made, and shall have sixty

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days from and after the date of the judgment, decree, or final order in the case within which to reduce the exception to writing and present the same to the court or judge for allowance. If within said sixty days the party excepting shall make it satisfactorily to appear to the court or judge authorized to allow the bill of exceptions that the party will be unavoidably prevented from presenting the bill within said time, the court or judge by written order may extend said time, but not to exceed sixty additional days."

As to the matters occurring upon the trial, including the findings and exceptions thereto, the bill was properly presented to Judge Parmelee, who presided at the trial, notwithstanding that his term of office had expired (Stirling v. Wagner, 4 Wyo. 5, 31 Pac. 1032). And having been presented to him on May 20, 1918, within the period of sixty days after the date of the order overruling the first motion for a new trial, which had been filed on December 30, 1916, and was based upon errors alleged to have occurred upon the trial and in the findings and judgment, the bill, as to the exceptions included therein taken upon the trial and to the findings and judgment, was presented strictly within the time granted by the statute in the absence of an order extending the time.

And we think the entire bill assailed by the motion to strike was presented in time, for the reason that it was presented to both Judge Raymond and Judge Parmelee within the time granted by the order of the court of March 22, 1918, made at the time of overruling said first motion for a new trial, which, in our opinion, is to be understood and construed as an order extending the time to and including the first day of the next term of said court. We know judicially that the first day of the next term, as prescribed by statute, was June 10, 1918, a period of 80 days from the date of said order, and only 20 days additional to the sixty days granted by the statute, and therefore within the power of the court or judge, by acting within the sixty days granted by the statute, to extend the time not to exceed sixty additional days.

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It is declared by the motion to strike the bill, and contended in support of it, that no extension of time for presenting the bill was applied for or granted; and the order aforesaid granting time is referred to by counsel in support of the motion as an attempt of the court to follow the former practice under section 4595, as the result of overlooking the amendment, and therefore ineffective for any purpose. But it seems improbable that the Judge could have overlooked or been ignorant of the amendment of such a statute enacted more than a year before the date of the order, and we think it much more reasonable to assume that the court, knowing the law, intended by the order to extend the time, under the authority conferred by the statute. It is certainly an order purporting to grant time within which to prepare, settle and file a bill, and since the statute has not limited or provided for limiting the time for settling or filing a bill, but only the time for reducing exceptions to writing and presenting the same for allowance (See Lee v. Cook, 1 Wyo. 417; Hardin v. Card, 14 Wyo. 479, 85 Pac. 246; Hawley v. LeClair, 18 Wyo. 1, 102 Pac. 850), the order, in that respect, must be construed as granting time to prepare and present a bill (Jones v. Bowman, 10 Wyo. 47). And as such it was clearly within the authority given to the court and judge by the statute in force at the time. That being the case, the order is not rendered ineffective by the fact that it does not expressly declare that the time allowed by statute is thereby extended (Marks v. Boone, 24 Fla. 177; Howard v. Carter, 71 Kan. 85, 80 Pac. 61; Gerdom v. Durein, 74 Kan. 704, 87 Pac. 1137). In Marks v. Boone, the court said:

"The court by an order made in term, granted appellant 'sixty days' additional time' for settling the bill of exceptions. This is, we think, to be construed as meaning sixty days in addition to the time allowed by the practice in the absence of an order extending the time, or, in other words, sixty days after the adjournment of the term in which the order was made."

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The statute does not seem to require that the request for an extension shall be in writing or filed. While the Court or Judge may, perhaps, have the right to insist, as a condition to acting upon such a request, that it be presented in the form of a written motion or application, an order made without it must be presumed to have been made upon proper request and a satisfactory showing. And a request for an extension of time and an order granting it may, we think, be made at the time of the final order, from the date of which the sixty days arbitrarily allowed by the statute will begin to run, as well as at any time subsequent thereto within the said sixty day period. (See Howard v. Carter, and Gerdom v. Durein, *supra*). For these reasons the motion to strike the bill will be denied.

The case upon the merits, as substantially stated in the briefs, is an action brought by the guardian of the estate of a minor child, to impress a trust upon certain real estate, resulting from the alleged unauthorized use of the funds of said minor by a former guardian in paying a certain mortgage upon said real estate and causing thereby its discharge upon the records, the specific relief asked being that said minor or the plaintiff, as her guardian, be subrogated to the rights of the mortgagee, and that the mortgage be revived as a lien upon the property with the same priority as before the payment and discharge thereof by the use of the ward's money.

Certain facts are either admitted by the pleadings or established by the evidence without controversy. Such facts are: The mortgage in question, dated October 31, 1906, was executed to J. Crouse Barr by Sterling P. Case and his wife, Hattie C. Case, covering certain lots in the City of Sheridan, then owned by said Sterling P. Case and upon which he resided with his wife and their minor child, Dott Case. It was given to secure the payment of a promissory note of the same date, executed by said Sterling P. and Hattie C. Case, for the sum of $1,000, due and payable one year after date with interest from date until paid at the rate of eight per cent. per annum. On September 14, 1907, said

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Sterling P. Case died intestate, having remained until his death the owner of said mortgaged property, subject to the mortgage, and leaving surviving him as his only heirs at law his widow, the said Hattie C. Case, and his daughter, said Dott Case, then nine years of age.

On October 9, 1907, said Hattie C. Case, upon her application, was, by the proper court in Sheridan county, duly appointed the guardian of said Dott Case, and upon the issuance of letters of guardianship on Oct. 12, 1907, she qualified on that date as such guardian. On said 12th day of October also, she was duly appointed by the same court administratrix of the estate of said Sterling P. Case, deceased, and until her death, which occurred on or about Jan. 28, 1915, Mrs. Case remained the duly appointed, qualified and acting administratrix of said estate and guardian of said Dott Case. After the death of her said husband and her appointment as guardian as aforesaid, and on or about Oct. 31, 1907, Hattie C. Case collected and received upon a fraternal insurance policy or benefit certificate carried by the defendant the sum of $1,000 payable to her under said certificate or policy, and the further sum of $1,000 payable to her daughter and ward, Dott Case, receiving said sums in two New York drafts for $1,000 each. And on that date she deposited the money represented by said drafts in separate accounts in the banking house of the State Loan and Trust Company at Sheridan, as follows: $1,000 to her personal credit in an account opened in her own name, and $1,000 in a separate account to her credit as guardian opened in the name of "Hattie C. Case, Guardian of Dott Case".

In April, 1910, the said Hattie C. Case, as administratrix aforesaid, filed an inventory and appraisement of the estate of said Sterling P. Case, deceased, whereby it appeared that the entire estate consisted of two lots in the original town of Sheridan and a dwelling house and other improvements thereon, upon which the decedent and his family resided at the time of his death, the same property covered by the mortgage aforesaid, and that it was appraised at the sum of $5,000. It is alleged in the petition and not denied by the

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answer of the defendants who are here as the only plaintiffs in error, that the said estate of said Sterling P. Case is indebted to the Bank of Commerce of Sheridan, evidenced by a mortgage dated June 16, 1913, given to said bank by said Hattie C. Case as administratrix, and in person, under an order made by said court in the course of the administration of said estate, and that said mortgage constitutes a first and paramount lien upon said real estate.

It is also alleged and not denied that after the death of said Hattie C. Case, and on the 13th day of February, 1915, by an order of said court in Sheridan county, one D. B. Bethurem was duly appointed guardian of the person and estate of said Dott Case, and was the duly appointed, qualified and acting guardian of the person and estate of the said minor at the time of the commencement of this suit. The said fact of his appointment was also shown by the introduction and admission in evidence of the petition for said appointment, the order therefor and the letters of guardianship issued thereon. It was alleged and admitted by the answer aforesaid that after the death of Hattie C. Case, one J. L. Stotts was appointed as administrator *de bonis non* of the estate of Sterling P. Case, deceased, and that Eff Sharp was duly appointed administrator of the estate of said Hattie C. Case, deceased, and that each of them duly qualified and was such administrator at the time of the commencement of this suit.

Thereafter, on April 3, 1915, this suit was brought by the said D. B. Bethurem, as guardian of the estate of said Dott Case, against said J. L. Stotts, administrator of the estate of Sterling P. Case, deceased, Eff Sharp, administrator of the estate of Hattie C. Case, deceased, and Samuel I. Gilpatrick and Hertha K. Gilpatrick as defendants; the petition alleging, with reference to the two last named defendants, that on or about November 19, 1914, the said Hattie C. Case pretended to make, sign, execute and deliver to said Samuel I. Gilpatrick and Hertha K. Gilpatrick, a deed for the said lots above mentioned and pretended to convey thereby all of said property with the improvements

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thereon, and that said deed was of record in the office of the county clerk of said county. And it was prayed by the petition that the said deed be declared subordinate to the rights of the said plaintiff or said Dott Case.

After the suit was commenced, it having been made to appear that said D. B. Bethurem had died on or about December 12, 1915, and that George W. Perry had been duly appointed in his place as guardian of said Dott Case, an order was regularly entered substituting the said Perry in his capacity as guardian as plaintiff in the action. J. L. Stotts, as administrator aforesaid, filed an answer, but there was no answer or appearance by the administrator of the estate of Hattie C. Case, deceased. And on the trial the only parties represented in opposition to the plaintiff were the said Samuel I. Gilpatrick and Hertha K. Gilpatrick.

The petition alleges that Hattie C. Case, after her appointment as guardian as aforesaid, and without any order or authority from the court, used the sum of $1,000 of her ward's money in paying and causing the discharge of the mortgage aforesaid. To sustain the averment of the petition in that respect evidence was introduced to show the fact of the payment of the note secured by the mortgage on November 13, 1907, and the discharge of the mortgage of record on November 14, 1907, and further evidence for the purpose of showing, and tending to show, that the money used in so paying the note and mortgage was the sum of $1,000 aforesaid received by Mrs. Case on Oct. 31, 1907, in her capacity as guardian for her daughter, and deposited in the bank to her account as guardian. Upon the evidence so introduced, no evidence having been offered by defendants, the court found generally for the plaintiff and against the defendants, and, specifically, that on November 13, 1907, the said Hattie C. Case, then the guardian of the estate of said Dott Case, and having in her possession the sum of $1,000 belonging to her said ward, took and used the same, but without any authority from said court, to pay off the said mortgage and note, causing thereby the discharge of the mortgage of record. That at the time of the

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payment and discharge of said note and mortgage, the same constituted a valid and subsisting indebtedness of the estate of Sterling P. Case, deceased, and a valid and subsisting lien upon said real property; that the said estate of Sterling P. Case was thereby enriched to the extent of said payment; and that a lien should be impressed upon the property for that amount with interest at the rate of eight per cent. per annum from November 13, 1907. That the said Dott Case should be subrogated to all of the rights of the said J. Crouse Barr to and under said note and mortgage, and that the mortgage should be revived in her name and for her benefit to the extent and in the amount of said sum with interest thereon as aforesaid. That she should have, and she was by the decree declared to have, all of the rights and privileges under said note and mortgage, had they not been paid and discharged. It was, however, found and so decreed that the lien impressed upon said property in favor of said minor shall be subordinate to the mortgage given by said Hattie C. Case to the Bank of Commerce. A judgment was entered accordingly, declaring also that the lien impressed upon said property and said mortgage as revived, shall be a first and prior lien upon the property, with the exception of the mortgage as aforesaid to the Bank of Commerce. Samuel I. and Hertha K. Gilpatrick excepted to the findings and judgment, and their motion for new trial alleging error on the trial and in the findings and judgment having been overruled and an exception having been reserved thereto, the case is brought here on error. Although several errors are assigned in the petition in error, the only assignment discussed in the brief of plaintiffs in error is that the findings and judgment are not sustained by sufficient evidence. And a discussion of that question is confined to the sufficiency of the evidence to show the use of the ward's money in the payment and discharge of said note and mortgage. No question is raised as to the power of the court to grant the specific relief which was granted by the decree or the propriety of granting such relief as against the plaintiffs in error, upon the facts found by the court.

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The fact of the payment of the note and the release of the mortgage aforesaid on November 13 and 14, 1907, respectively, is not controverted, but it may be well to state that these facts were proved by the plaintiff's introduction of the original note in evidence across the face of which was written, "Paid in full this 13th day of November, 1907, and satisfied. F. H. Stotts & Co."; and by the introduction of the record of the mortgage showing its release on the margin thereof on November 14, 1907. And this was supplemented by testimony, not contradicted, that at the time of the endorsement of the fact of payment upon the face of the note F. H. Stotts, whose name was signed to said endorsement, was then the agent of J. Crouse Barr, the payee and mortgagee, and had since died.

The evidence to show that such payment was made by Hattie C. Case and by the use of her ward's money consists of the following: Duplicate deposit slips were introduced showing the deposit on Oct. 31, 1907, by Hattie C. Case of a New York draft for $1,000, and also the deposit on the same date by "Hattie C. Case, Guardian of Dott Case", of a New York draft for $1,000. These slips were identified by the testimony of the officer of the bank who made them out, and he testified also to the fact of said deposits. Certain sheets taken from the ledger of the bank were introduced showing the personal account of Hattie C. Case and her account as guardian of Dott Case. It appeared thereby that the only entries in the latter account consisted of an entry showing the deposit on Oct. 31, 1907, of $1,000 and the payment of a check for a like amount on November 14, 1907, balancing the account. Her personal account contained several entries showing, first, the deposit of said sum of $1,000 on Oct. 31, 1907, and, thereafter, a few deposits from time to time of much smaller amounts, aggregating $370, or a total credit on the account of $1,370, and several debit items paid by the bank between November 14, 1907, and March 13, 1909, varying in amount from $20 to $240, the last item being $240 and balancing the account on March 13, 1909. There were two checks charged against this ac-

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count on November 14, 1907, for $150 and $80, respectively. Thereafter, November 18, a check for $240 was charged as paid, one for $20, on December 21, and one for $75 on December 30, which are all of the debit items against the account during the year 1907. And no other debit items appear on the account until the succeeding April.

The plaintiff also introduced a check book appearing to have been one used by Mrs. Case, containing several blank checks of said bank and a few stubs with memoranda of other checks torn out. Upon the first stub was entered the number "1", and date "Nov. 13, 1907", amount "1000" in the column for dollars, and the words "Pay to Barr for mortgage". The second stub was also numbered "1" and dated November 13, 1907, and indicated that the check was for $80, and contained the words "Pay to J. C. Barr for Mortg". The words "Pay to" and "For" were printed on each stub, the others written. The next stub, which has no connection with this particular matter, and is important here only because it is numbered "2", is also dated Nov. 13, 1907, states that it was for $150, and was apparently written by the same person as the other two. In connection with this check book, it was first attempted to be shown that the memoranda on the first two stubs were in the handwriting of Mrs. Case. But the witness who at first so testified changed his testimony upon further consideration, and we think it appears from the evidence that the writing on said stubs was by somebody other than Mrs. Case, though probably by somebody for her and at her request at the time of drawing the checks. The check for $1,000, represented by the first stub, and paid out of the account in the bank in the name of Mrs. Case as guardian, appears to have been lost, for it could not be found either among the papers of Mrs. Case, her successor as guardian, or the bank.

In our opinion, this evidence, if it stood alone, would be sufficient to sustain the finding of the court as to the use of the ward's funds. Aside from the coincidence of the dates of the payment of the note and the check for $1,000, as shown by the stub aforesaid, the fact of the payment of a

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check for that amount the next day out of the ward's account at the bank, kept in the name of her mother as guardian, and the release of the mortgage the same day, the memorandum on the check stub, the fact that the amount in the guardian's personal account was all drawn out from time to time by checks for small amounts, and the circumstances of the mortgage,—the fact that it and the note had been executed by the ward's parents and was a lien upon the family homestead, which continued to be occupied by mother and daughter—the guardian and ward, as a home after the death of Mr. Case, these facts strongly indicating that Mrs. Case had paid at least the principal of the note and mortgage with her ward's money, we think the fact is significant that the first and second stubs of Mrs. Case's check book, bearing the same date, and each indicating that the check was drawn to pay Barr for mortgage, were each numbered "1", while the next stub, of the same date, stating a different purpose, was numbered "2". The fact of numbering these two checks "1", as indicated by the respective stubs, would be entirely proper if one of them, the check for $1,000, had been signed by Hattie C. Case as guardian and the other had been signed by her personally. And in connection with the evidence as to the payment of the two checks at the bank, the first out of the guardian account, and the second out of the personal account of Mrs. Case, we are inclined to think that the fact that these checks, as indicated by the stubs, bore the same number, is at least some evidence that the $1,000 check was drawn against the account out of which it was paid. The check for $80, shown by the second stub, with the memorandum as to its purpose, would seem to have been intended for the purpose of paying the interest on the note and mortgage, since that would be the amount of the interest for one year, covering nearly the period the debt had run before it was paid.

But that is not all of the evidence upon the subject. In addition thereto, the officer of the bank who had testified to the deposit slips and ledger sheets aforesaid testified to conversations with Hattie C. Case with reference to the payment

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of the Barr mortgage: That upon her speaking to him about the mortgage he suggested to her that she might secure an order of court to use the money belonging to Dott to pay the amount due and take an assignment of the mortgage, and that later she told him that she had taken care of the mortgage, but without stating in what manner. And a Mr. Marvin testified that about a month or six weeks after Mr. Case died he had a conversation with Mrs. Case with reference to the mortgage, he being one of her bondsmen, and she having advised with him a good deal, in which she asked him what he thought about her using Dott's insurance money to pay off the Barr mortgage, and that he told her he thought it was the proper thing to do. That perhaps a month after that he asked her if she had taken up the mortgage and she said that she had, and that she had used Dott's money to take it up.

It is contended that this testimony of Mr. Zullig and Mr. Marvin as to the conversations with Mrs. Case were not received in evidence as against the plaintiffs in error and that such evidence should not be considered. It appears that when the first question with reference to the matter was asked of Mr. Zullig, viz: "Did she ever say anything to you about the mortgage known as the Barr mortgage?" the question was objected to as incompetent, and the court said: "It may be admitted as against the administrator of Hattie C. Case, but not against these defendants, the Gilpatricks." No other objection was made during Mr. Zullig's testimony upon that subject. When Mr. Marvin was asked if he ever had any conversation with Hattie C. Case with reference to the mortgage, that question was also objected to, the court said: "It may be admitted in accordance with the ruling on the other question." This remark of the court could only have had reference to the like question previously propounded to Mr. Zullig. In Mr. Marvin's direct examination also no further objection was made to the remainder of his testimony on the subject. If the record had stopped there we would be inclined to think that court and counsel might have understood that the testimony with

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reference to these conversations with Mrs. Case on the direct examination of said witnesses was admitted in evidence only as against the administrator, and not as against the defendants who are the plaintiffs in error here, and we should doubt the right of the court to consider the same.

But, as above stated, the only defendants appearing at the trial were the two Gilpatricks, plaintiffs in error here, and notwithstanding that the evidence of said conversations had been admitted as against the administrator only, and not as against these plaintiffs in error, their counsel cross-examined Mr. Marvin at length about the conversations he had testified to, and upon such cross-examination said witness repeated substantially what he had said in his direct examination concerning the matter. Under the circumstances, the practical effect of such cross-examination by the plaintiffs in error was to make the witness their own, and they cannot, therefore, properly complain that the evidence brought out thereby is not in the case as against them.

Concluding that the evidence was sufficient to sustain the finding of the court with reference to the use of the ward's money to pay the note and mortgage in question, and that being the only question raised upon the merits, the judgment will be affirmed. *Affirmed.*

BEARD, C. J. and BLYDENBURGH, J., concur.

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ACTION.

1. Where it does not appear from the pleadings or evidence in an action to restrain the county treasurer from advertising at the expense of the county, a tax sale of irrigation district land, that taxes were levied on such land, the levy will be presumed to have been made as required by statute. Commissioners v. Featherstone, 1.
2. Where a county disclaiming liability for the expense of advertising a tax sale of irrigation district land may disallow a claim therefor and set up a complete defense to an action brought thereon, an injunction to restrain the treasurer from advertising such sale is unnecessary. Id.
3. In a suit by a county and a resident thereof to restrain the county treasurer from advertising a tax sale of irrigation district land at the county's expense, where it did not appear that it either owned any of such land, or had any interest in the collection of such tax, an injunction should not be granted. Id.
4. In an action to restrain the treasurer from advertising a tax sale of land upon the ground that such advertisement was futile and a waste of money, the court cannot assume, from failure to sell such land at former tax sales, that there would be no bidder at the proposed sale. Id.
5. Where plaintiff in action for services stated his case in separate counts, each purporting to state a separate and distinct cause of action, the verdict on each count must be sustained by evidence as if there were separate actions, and it is not enough that it supports some verdict, but it must support that actually rendered. King v. Beaumier, 35.
6. Where plaintiff sued in eight counts for services rendered, aggregating nearly $6,000, admitting unapplied credit of $1,765, which exceeded the amount of the two first due counts, verdict for plaintiff on such counts could not be sustained, since the credit must be applied to the amounts first due. Id.

See Reformation of Instruments, 1; Probate Law, 1; Condition Precedent, 1; Accounting, 1; Mechanics' Liens, 1–8.

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ACCOUNTING.

1. An action for accounting will not lie, where the account, if any, is all on one side and consists of four items of money paid; the money being recoverable in law as conveniently as in equity. Commissioners v. Featherstone, 1.

ADMISSIONS. See Criminal Law, 7, 8.

ADOPTION.

1. At the common law, adoption was unknown; therefore the law governing the adoption of minor children and the rights and liabilities emanating therefrom are governed purely by statutory provisions. In re. Cadwell's Estate, 412.
2. Statutes conferring on an adopted child the right to inherit property and the statute of descent and distribution relating to the same subject, should be construed together as one law. Id.
3. It is a rule of statutory construction that the expression of one exception excludes all other exceptions. Id.
4. The term "descendant", as used in Comp. Stat. 1910, Sec. 5727, Sub-Div. 2, includes an adopted child when considered in connection with the adoption statute, Comp Stat. 1910, Sec. 3964, which declares that an adopted child "shall be entitled to the same rights of person and property as the children or heirs at law of the persons thus adopting them, therefore, a son by adoption becomes the legal heir of the intestate brother of his adoptive father, who died before the intestate brother." Id.

ADVERSE POSSESSION.

1. Where one locates a ditch and flume on another's land with consent and permission, and relies on the license therefor, he cannot claim a right of way by adverse possession. Allen v. Lewis, 86.
2. Adverse possession cannot be based entirely on possession under a mistaken belief that a division fence built by claimant was on the true line. Id.
3. In an action for trespass by the maintenance of a flume over plaintiff's land, claimed by defendant to be maintained by consent of former owner, findings of fact that such owner consented, and that defendant's use of the ditch and flume was adverse to such former owner, and conclusions of law that defendant's entry was under license, and that defendant had obtained title by adverse possession, were inconsistent. Id.

AGENCY.

See Mechanics' Liens, 1, 2.

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AMENDMENTS.

1. Refusal of the trial court to allow defendants to amend their answers after the evidence had all been introduced was properly refused, for such proposed amendment would not conform to the proof as found by the Court from the evidence. Richards v. Richards, 421.

APPEARANCE.

See Appeal and Error, 36.

ANIMALS.

1. The common law rule requiring the owner of domestic animals to restrain them has never been enforced in this state because of different conditions existing that render the rule inapplicable, the owner of such animals having a right to permit them to run at large, and no actionable trespass is committed by such animals lawfully running at large, or straying upon uninclosed lands. Garretson v. Avery, 53.
2. The rule of the common law that it is not the duty of a land owner to fence against the livestock of another, is also the rule in this state, in the absence of a contract or statute imposing that duty, or unless such duty has arisen by prescription. Id.
3. Where no obligation rests upon a land owner to fence out another's livestock, or to prevent them from straying or entering upon his land, the owner of uninclosed land is under no duty to make or keep them in safe condition for stock straying thereon. Id.

APPEAL AND ERROR.

1. Since the statute providing for direct appeals requires the serving and filing of notice of appeal and the preparation and filing of record on appeal within ten days from the entry of the order or judgment appealed from, it is necessary to show jurisdiction that the fact of the entry of the judgment or order, as distinguished from the rendition thereof and the date of the entry, shall be shown by the record. Goodrich v. Bank, 42.
2. A motion to withdraw the record on appeal for amendment showing the fact and date of entry of judgment will be denied, where, if so amended, the record would show that it was not filed within the statutory time after entry of judgment, so that the Supreme Court would remain without jurisdiction. Id., 43.
3. A party plaintiff against whom judgment was rendered cannot complain of error below, where he filed no motion

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APPEAL AND ERROR—*Continued.*

for new trial, although another plaintiff filed such a motion and brought error. Beckstead v. Bank, 67.

4. Under Laws 1917, Ch. 32, Section 10, authorizing court to award new trial to an appellant on the appeal record and specification of errors filed, within 15 days after notice from clerk, order granting new trial, entered after the 15 days, was properly amended to show that new trial was considered within time, but hearing by consent of parties was had after the 15 days. Allen v. Lewis, 85.
5. That an appeal from an order granting a new trial under Laws 1917, Ch. 32, authorizing court to award new trial to appellant on appeal record and specification of errors, has been filed in the Supreme Court, does not deprive the trial court of the right to amend the order by the addition of facts *nunc pro tunc*. Id.
6. Where an order amends an order granting a new trial, it may be brought into the record on appeal on a party's application. Id.
7. Where an amendment of an order for new trial appealed from is incorporated into the record on appeal on a party's application, the record need not be returned for correction, since, under Supreme Court rule 12 (104 Pac. xii), omissions may be incorporated by requiring the clerk to certify thereto, or by granting leave to file a duly certified copy. Id.
8. Laws 1917, Ch. 32, providing for a review by direct appeal from an order granting or refusing a new trial, does not repeal the provisions for review of a cause on error. Id.
9. An affirmative statutory provision relating to the time or manner of performing official acts, unqualified by negative words, is directory rather than mandatory, though it is a question of intention to be ascertained from a consideration of the entire act, its nature, object, and consequences of construction. Id.
10. The provision of laws 1917, c. 32, authorizing court to award new trial to an appellant on the appeal record and specification of errors filed, that review of record must be had in 20 days, may be waived by consent, and the record retained in the trial court until the expiration of the extended time. Id. 85-86.
11. Where, under Laws 1917, c. 32, Sec. 10, authorizing court to award new trial to an appellant on appeal record and specification of errors, within 20 days after filing of specifications, the court granted a new trial, but by consent of

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APPEAL AND ERROR—*Continued.*

parties order was not made until after the 20 days, such action did not preclude appeal by other party, it being provided that an appeal might be taken from the order granting the new trial. Id. 86.

12. To justify a reversal, in the absence of a record showing of the reasons on which the trial court acted in granting a new trial to plaintiff, there must be nothing in the specifications of error which would entitle plaintiff to a new trial. Id.

13. In trespass for maintaining a flume over plaintiff's land for which defendant claimed to have a right of way by consent of a prior owner, new trial to plaintiff on ground that evidence did not show that such consent was given with full knowledge of the location of the true line held not error. Id.

14. It is a uniform rule that an appellate court will not disturb a finding of fact made by a trial court when there is evidence upon which the finding may be reasonably based. Hunt v. City of Laramie, 160.

15. Where judgment was rendered January 30th, filed January 31st without any showing as to when it was entered, and the record, including the specifications of error filed April 4th, was certified to by the clerk of the district court on the following day, and by the district judge on April 9th, and filed in the Supreme Court on April 26th, the appeal cannot be dismissed on the ground that the record was not filed within time, the statute providing that if the district judge fails to grant a new trial within 20 days from the filing of specifications of error, the clerk of the district court shall transmit the record to the clerk of the Supreme Court, etc. Budd v. Roy, 210.

16. Where the record was filed in the Supreme Court April 25th, but appellant failed to file briefs within the 60 days required, and no action was taken upon an application for extension of time, the appeal will be dismissed for want of briefs; no briefs having been filed before the filing of motion to dismiss. Id.

17. Under Laws, 1917, c. 70, sec. 1, authorizing trial court within 60 days from its decision to extend time for filing bills of exception, an extension order made after the 60 day period is void. Morgan v. State, 212.

18. Alleged error in overruling a new trial motion can be reviewed only when the motion is included in the bill of exceptions. Id.

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APPEAL AND ERROR—*Continued.*

19. The fact of service of notice of appeal and the filing thereof within ten days from entry of judgment must appear from the record to confer appellate jurisdiction under Laws, 1917, Chapter 32, Section 2; service of notice prior to entry of judgment is insufficient. Culbertson v. Ainsworth, 214.
20. A notice of appeal dated prior to, but filed after entry and filing of judgment without date of service endorsed thereon is insufficient under the Statute, and affidavits showing service prior to entry of judgment will not be considered. Id.
21. Where notice of appeal was dated prior to entry and filing of judgment and the endorsement acknowledging service appearing upon such notice was undated, no presumption arises from the record that the notice was served within 10 days after entry of judgment, as required by the Statute, though notice of appeal was filed after such entry of judgment. Id.
22. The direct appeal statute, Laws 1917, Chapter 32, Section 2, does not authorize a waiver of service of appeal and a waiver by stipulation of the parties of service of notice of appeal is not competent since appellate jurisdiction cannot be conferred by consent. The direct appeal statute contains no provision authorizing a waiver of service of notice of appeal, such as is provided by Comp. Stat., 1910, Sections 5111 and 5112, authorizing a waiver of the issuance or service of a summons in error. Id.
23. Where the evidence is conflicting, but there is substantial evidence to support the verdict, it will not be disturbed on appeal. Irrigation Co. v. Laporte, 250.
24. An appeal record certified by the Clerk as containing a true copy of the judgment entered in the Journal and containing the original paper signed by the Court, preceded by a statement that it was entered by the Court upon the Court Journal bearing a notation as to volume and page is sufficient to identify such writing entered on the Journal, as the judgment. Kendrick v. Healey, 261.
25. An order extending time for filing a record on appeal under Laws of 1917, Page 32, Secs. 4 and 5, includes an extension of time for preparing and filing the transcript of the testimony, since, under Sec. 6 of the chapter, such transcript is a part of the record on appeal. Id.
26. A clerk's certificate that "the foregoing transcript is a true and correct transcript of all the testimony offered at the

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APPEAL AND ERROR—*Continued.*

trial of the above entitled cause" being the exact equivalent of the words of the statute, Laws 1917, Chap. 32, Sec. 5, is sufficient. Id.

27. Where the Judge and Clerk each certify that an appeal record is true and correct, the order of time in which they make such certificates is immaterial if made within time for filing. Id.

28. The certificates of the Judge and Clerk to a record on appeal are not a part of the appeal record within Laws of 1917, Chapter 32, Sec. 6, as amended, requiring the record to be paged and numbered consecutively. The requirements as to paging and numbering is not jurisdictional, and necessary corrections may be made without withdrawing the record. Id. 262.

29. Service of specifications of error prior to filing of the record in appeal proceedings is not a ground for the dismissal of the appeal. Id.

30. An order extending time for the filing of an appeal record may be made in chambers during the vacation of the court and becomes effective upon the signing thereof by the Judge within the original 70 days from the date of the entry of judgment, even if such extension order be not entered on the Journal for some time thereafter. Id.

31. An appeal record may, on proper showing and seasonable application, be withdrawn for amendment in accordance with the facts; but the application to withdraw must set forth the specific amendment sought to be made and it must be made to appear that the amendment will cure a substantial defect. Id.

32. A motion for extension of time to file briefs, made subject to a ruling on a motion to dismiss, filed the same day, did not waive the right to move for a dismissal. North Laramie Land Co. v. Hoffman, 327.

33. A petition in error signed by nonresident attorneys only is a nullity, and will be dismissed upon motion. North Laramie Land Co. v. Hoffman, 328.

34. The direct appeal statute, Laws 1917, Chapter 32, Section 10, does not require the record to show that the Clerk notified the Judge within five days after specifications of error are filed in his office, that the record on appeal is perfected. It is made the duty of the Clerk to give such notice and in the absence of a showing to the contrary, it will be presumed that he performed the duty. Carstensen v. Brown, 356-357.

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APPEAL AND ERROR—*Continued.*

35. Where the record on appeal does not contain a certified copy of the entry of the order of judgment appealed from, or such copy of any journal entry, the appeal will be dismissed. McGinnis v. Beatty, 409.
36. Appearance by appellee while sufficient as a waiver of lack of jurisdiction of the person, does not confer jurisdiction of the subject matter or cause, where the appeal record does not show the entry of judgment below. Id.
37. Grounds of error assigned in the petition in error but not specifically mentioned in the motion for a new trial, are waived and cannot be considered in the Supreme Court. Murphy v. Livestock Co., 455.
38. An appellate court should not reverse a verdict rendered on conflicting evidence. Id.
39. A "record on appeal" under the statute requiring such record to be filed within 70 days after judgment, includes a transcript of the evidence when necessary, with the original pleading, motions, etc., attached together, paged, and numbered consecutively and certified to by the Judge and Clerk as true and correct. Goodrich v. Big Horn County Bank, 490.
40. Where an appeal was not perfected within the time allowed therefor, the right to appeal was lost and the Supreme Court acquired no jurisdiction of the subject matter of the case by the filing with it of such record on appeal. Id. 492.
41. Where there was a conflict in the evidence, and there was substantial evidence to support the finding, it will not be disturbed. Phelan v. Cheyenne Brick Co., 495.
42. The failure to sustain motions to strike out evidence will not be reviewed, where it is not specified as error in the motion for a new trial. Id. 496.
43. A specification of error in a motion for new trial, relating to the overruling of objections to the introduction of evidence does not cover the failure of the court to sustain motions to strike out evidence, to which no objection had been interposed. Id.

See Findings, 1, 2; Criminal Law, 11.

APPEAL BOND. See Bond, 1.

ATTACHMENT.

1. In attachment proceedings before debt due, the gist of the matter is the intent of the debtor to defraud his creditors and it must be shown that certain things were done by the defendant, that are given in the statute (Comp. Stat. 1910, Secs. 4890-96) as grounds for attachment, and done to

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ATTACHMENT—*Continued.*

hinder, delay and defraud his creditors. The burden of proving this intent to defraud is upon the plaintiff. Stockgrowers' Bank v. Millard, 394.

2. In attachment proceedings before debt due, upon the grounds that defendant had sold, or was about to sell, his drug business with intent to defraud his creditors, evidence held to show that defendant sold his business with an honest intent to pay his creditors. Id.
3. Where it is shown that defendant has disposed of most of his property for the purpose of paying his debts and used the proceeds for that purpose, held, not to show a fraudulent intent and not grounds for attachment. Id.
4. In the absence of knowledge or connivance by the purchaser, the omission of a creditor from the list furnished by the seller in an attempt to comply with the Bulk Sales Law (Laws 1911, Chap. 33 as amended by Laws 1913, Chap. 14) was not grounds for attachment before debt due under Comp. Stat. 1910, Secs. 4890-96. Id.
5. In proceedings for attachment before debt due, evidence of statements of defendant that he intended to go into the National Army, and that he intended to get a job in another state, was insufficient to show intent to change his legal residence, or a fraudulent intent on the part of the defendant, or sufficient grounds for attachment. Id.
6. The fact that defendant had disposed of his property and was insolvent, would not in itself, be grounds for attachment before debt due, it not being shown that he had disposed of a note taken on sale of his property, which was not due for three years. If he was still the owner of the note so that a garnishment would lie at all as to it from the evidence, he was far from insolvent, and had a substantial balance over all his debts and liabilities. Id. 394-395.

See Garnishment, 1.

ASSIGNMENTS OF ERROR.

See Appeal and Error, 5, 10, 12, 15, 29, 34, 43.

ATTORNEY AT LAW.

1. Nonresident attorneys may, under Comp. Stat. 1910, Sec. 966, be admitted *ex gratia* for purposes of a pending case in which they have been employed, but not as members of the Bar of the State, and the section does not authorize a nonresident attorney to sign a petition in error. North Laramie Land Co. v. Hoffman, 327.

See Appeal and Error, 33.

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ATTORNEY'S FEES.

1. A previous demand for payment of a past due debt is not generally necessary to a recovery of attorney's fees provided for in a note or mortgage. Graves v. Burch, 192.
2. A provision for attorney's fees in a note or mortgage is a contract of indemnity in the nature of a penalty, as distinguished from liquidated damages, to compensate payee for expense incurred or liability for expense created through the fault of the maker or mortgagor. Such fees even where fixed by stipulation for a stated amount are within the equitable control of the court to allow only such sums as may be reasonable and may be disallowed altogether under circumstances rendering a recovery inequitable or unconscionable. Id. 192-193.
3. Where the payee in a note secured by mortgage past due lulled the maker into a sense of security by stating that he was not needing the money and that she need not worry about the payment, it would be inequitable to allow the recovery of attorney's fees provided for in the note, where foreclosure proceedings were brought without further notice, giving the debtor an opportunity for payment; mortgagee upon suit being brought tendering the amount due. Id.
4. Where a payee in a note secured by a mortgage was not equitably entitled to attorney's fees, having lulled the maker into a sense of security by informing her that there would be no immediate foreclosure, an assignee of the mortgage and note after the note was overdue, took them subject to the equities existing at the time of the assignment and was not entitled to attorney's fees where he immediately brought suit to foreclose without notice. Id.
5. Where the maker of notes and mortgage tendered payment in gold at maturity, which was refused by the holder who published notice of foreclosure three days thereafter, the holder was not entitled to recover attorney's fees under a provision of the notes providing for an attorney's fee, if placed in the hands of an attorney for collection or collected by an attorney with or without suit. H. E. Wright & Co. v. Douglas, 306.

BANKS AND BANKING.

1. In an action by the owner of a note and mortgage against a national bank for conversion of a note and mortgage by its cashier, the owner having been induced to send the note and mortgage to the cashier by his letter indicating that they would be paid from the proceeds of a loan he was

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BANKS AND BANKING—*Continued.*

negotiating for the mortgagor, a statement in the letter by the cashier that "we are negotiating a real estate loan" for the mortgagor, did not necessarily imply that the bank was intending or expecting to make the loan direct, or with money under its control, so as to give notice to the owner that an illegal loan, that is, one prohibited by the National Banking Act, was contemplated, and thus charge him with knowledge of want of authority of the cashier to act for the bank in requesting him to send the papers to the bank. Chapman v. Bank, 138-139.

2. The owner of a note and mortgage is not bound to inquire concerning the security to be taken by a national bank desiring to advance money to take up the note and mortgage and hence is not required to inquire concerning authority of the cashier to request sending of note and mortgage to the bank. Id. 139.
3. The acceptance of a commercial paper for collection by a banking corporation is a well settled incident of the banking business, and a bank is liable in case it fails to perform its duty in making collection. Id. 139.
4. A cashier of a national bank has authority to accept for the bank notes and mortgages for collection. Id. 139.
5. The cashier of a bank is generally its chief executive officer and its general agent in the transaction of its legitimate business, and a bank is bound by his acts in the absence of notice to persons dealing with the bank of any restriction upon the authority of its cashier. Id. 139.
6. Revised Codes of Montana, Section 4012, providing that the stockholders of every banking corporation formed under the Chapter of which said Section is a part shall be liable to the extent of the par value of stock owned by them for corporation debts, is not confined in its operation to banking corporations organized under the act in which said Section appears, but applies to banking corporations existing at the time the act was passed. Miller v. Amoretti, 170.
7. The liability of a stockholder in a banking corporation organized under the Act of which Revised Codes of Montana, Section 4012, is a part, for a debt of a corporation to the extent of the par value of his stock, is contractual and runs directly to the creditors of such corporation. Such liability is not an asset of the corporation, and cannot be enforced by a general receiver of an insolvent banking corporation by action in a foreign State, where the Statute

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BANKS AND BANKING—*Continued.*

authorizing his appointment does not empower him to bring such an action in Montana. Id.

8. This court, in deciding whether a receiver appointed in Montana can maintain an action in Wyoming to enforce the liability of stockholders of a bank under the Montana Statute, will follow a decision of the Montana Supreme Court, holding that the Statute created a right of action in creditors alone, though the action in which the decision was rendered was brought by creditors and the question arose only incidentally on the issue of a right to set-off by defendant of a claim against the defendant. Id.

BILL OF EXCEPTIONS.

1. A bill of exceptions as to matters occurring on trial, including the findings and exceptions thereto, is properly presented to the judge who presided at trial, notwithstanding his term of office had expired. Gilpatrick v. Perry, 538.
2. Where defendant's motion for new trial was overruled on March 22nd, by the judge to whom same had been referred, the bill of exceptions as to matters occurring at trial, which was presented to the judge who had presided but had gone out of office, was within time, where it was presented May 20th, being within 60 days. Id.
3. As Comp. Stat. 1910, 4595, as amended by Laws 1917, c. 70, 1, has not limited the time for settling or filing of bill but only the time for reducing exceptions to writing and presenting the same for allowance, an order of the court overruling motion for a new trial and granting the defeated party time until the next term of court to prepare, settle and file bill of exceptions, must be deemed as granting time to prepare and present a bill. Id.
4. An order, entered on the overruling of motion for new trial, which extended the time for filing bills of exceptions until the next term of court being within the power of the court under Comp. Laws 1910, 4595, as amended by Laws 1917, c. 70, 1, because the next term of court began within 80 days, is valid, although it did not expressly declare that the 60 day period allowed by statute was extended. Id.
5. Comp. Stat. 1910, 4595, as amended by Laws 1917, c. 70, 1, fixing the time for presenting bill of exceptions, and allowing the trial court to extend the same, does not require that the request for an extension shall be in writing or filed, although the judge may perhaps have the right to insist, as a condition to acting upon such request, that

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BILL OF EXCEPTIONS—*Continued.*

it be presented in the form of a written motion or application. Id.

6. Where the time for presenting bills of exceptions as fixed by Comp. Stat. 1910, 4595, as amended by Laws 1917, c. 70, 1, is extended, it will be presumed that the order of extension, made without written application, was made upon proper request and a satisfactory showing. Id. 539.
7. The time for presenting bills of exceptions may be extended at the time of the final order from which under Comp. Stat. 1910, 4595, as amended by Laws 1917, c. 70, 1, the defeated party would have 60 days in which to present bills of exceptions. Id.

See Appeal and Error, 17, 18.

BOND.

1. A bond given on appeal by a city from an order of the State Board of Control involving water rights, duly executed by the Mayor and Clerk on behalf of the city, was not vitiated by a failure to write the name of the city at the end of the bond, the body of the bond and attestation clause clearly showing the instrument to be an obligation of the city. Hunt v. City of Laramie, 160.

BRIEFS. See Appeal and Error, 16, 17, 32.

BROKERS.

1. Where, pursuant to an ordinary brokerage contract, the broker has procured a purchaser, ready, willing, and able to buy at the price named, and an enforceable contract is entered into between the owner and the purchaser found by the broker, the broker's commission is at once due and payable, though the contract is never carried out by the final payment of the purchase money. But in an action to recover such commission plaintiff is required to sustain the contract pleaded by him, by a preponderance of the evidence. Murphy v. Livestock Co., 455.
2. In an action by a broker for commissions for finding a purchaser for ranch lands and livestock, where there was evidence tending to show that plaintiff did not think he was entitled to be paid commissions until defendant had received all of the purchase price, a verdict for the defendant will not be disturbed. Id.
3. In an action by a broker for commissions for procuring a purchaser for lands and live stock, an instruction presenting plaintiff's theory of the case as well as the defendant's is not violative of plaintiff's rights. Id.

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BROKERS—*Continued.*

4. Where broker's commission is by contract made dependent upon certain conditions or contingencies, as upon the consummation of sale, or payment of the purchase price or a specified part thereof, or a net price to the owner, these stipulations will govern, and a fulfillment of the prescribed conditions is generally essential to the right of compensation. Id. 455-456.
5. Where broker's proposal was that he should name $35,000 as price for a ranch, and "after getting $30,000 for you for the ranch, the $5,000 will be my commission", the extra $5,000, that particular part of the total price to be named, was to constitute the commission, and broker was entitled to no compensation where purchaser paid first installment of $10,000 and then defaulted. Id.
6. Where a broker's contract of employment provides for net price to the owner or for a commission out of or to consist of the excess above stated price, such contract is generally construed as requiring, as a condition to the right to the agreed commission, an actual or completed sale for an amount exceeding such net or selling price, unless the same has been prevented by the fault of the owner. Id.

See Pleadings, 10.

BURDEN OF PROOF. See Attachment, 1.

BOUNDARIES. See Estoppel, 1, 2; Judicial Notice, 1.

BULK SALES. See Attachment, 4, 5.

CASHIER. See Banks and Banking, 1-5.

CHATTEL MORTGAGES.

1. Where sheep of mortgagor of land were transferred to first mortgagee by bill of sale, stating they were taken at a price in excess of indebtedness, with intent to prevent other creditors from attaching the surplus, first mortgagee could not thereafter claim, as against a second mortgagee, that the price stated was not the true consideration, and that the full amount thereof was not applied on the first mortgagee's indebtedness, although the sheep sold on the market for less than the first mortgagee's claim. Beckstead v. Bank, 67.

CHILDREN—CUSTODY OF.

1. In determining the question of its custody, the welfare of a child of divorced parents is a matter of paramount con-

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CHILDREN—CUSTODY OF—*Continued.*

sideration. Judgments awarding custody of children of divorced parents, necessarily provisional in character, ordinarily are not *res judicata* either in the same court or that of another state, despite the full faith and credit clause of the Federal Constitution (Art. 4, Sec. 1), except as to the specific facts before the court at the time of any judgment in question. Linch v. Harden, 47.

2. Where an Oregon court which had divorced the father and granted him custody of his minor daughter on the ground that the mother was not a suitable custodian, a Wyoming court thereafter, upon a showing that the mother was in a situation and condition properly to care for the child properly, awarded custody to her; the Oregon decree being conclusive only as to facts on which it was made. Id.

CITIES AND TOWNS.

1. Where no record was made of city council proceedings at which the rights of the parties were settled, those proceedings can be proved as against the city by parol, though a record thereof could not be contradicted by parol, since the city is estopped from claiming any advantage by its failure to perform its duty to record council proceedings. Rohrbaugh v. Mokler, 515.

See Dedication, 1; Contracts, 2, 3, 4; Estoppel, 3.

COMMISSIONS. See Brokers, 1-7.

CONDITION PRECEDENT .

1. In a suit to recover money deposited with a stakeholder in payment for land condemned by a municipality, title to the land being in controversy as between defendant and plaintiff, under a deed directing plaintiff to make certain payments after the grantor's death, plaintiff, having alleged that he was the absolute owner of the money, was under no necessity of alleging compliance with the directions of the deed as a condition precedent. Watts v. Lawrence, 367.

CONFLICT OF LAWS. See Interest, 3.

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CONSTITUTIONAL LAW.
1. Where a receiver of an insolvent bank, in pursuance of an order of the appointing court, brought an action in a court of another State, to enforce the statutory liability of a stockholder, denial by such court of his right to recover does not violate Const. U. S., Art. IV, Section 1, requiring full faith and credit to be given in each State to the judicial proceedings of another State, since inquiry into the foreign court's jurisdiction is not a denial of full faith and credit. Miller v. Amoretti, 170-171.

See Supreme Court, 3; Public Officers, 1-4; Children, 1; Prohibition, 1.

CONSTRUCTION OF CONTRACTS. See Contracts, 1; Water Rights, 4.

CONTINUANCES.
1. It was not error to refuse a continuance, under Comp Stat., 1910, Sec. 5139, applied for on the ground of the absence of a witness residing in another state, where defendant had relied on his promise to attend and made no effort to secure his testimony by deposition or his attendance by legal process. Chapman v. Bank, 138.

CONTRACTS.
1. Where the meaning of a contract or other written instrument is doubtful on its face, the practical construction put on it by the parties has great weight, especially where they have for a long time acquiesced in and acted in good faith on such practical construction. Rohrbaugh v. Mokler, 514.
2. Where a town, in consideration of a lot owner's waiver of his rights under a contract to another tract of land, vacated, under the authority of Rev. Stat. 1899, 1545, Par. 4, a part of the street in front of his lots, and had built a public library on the property surrendered by him, so that

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CONTRACTS—*Continued.*

it could not restore his former situation, it is estopped to deny the validity of the vacation of the street. Id. 514-515.

3. Where a city vacated a part of a street, in consideration of the surrender by the adjoining owner of his rights under an oral contract, which the lot owner and the other party treated as valid, the city cannot thereafter attack the validity of that contract. Id. 515.
4. Where an oral contract creating interests in land has been carried into effect, and each party has gone into possession thereunder, the rights so acquired are not affected by the statute of frauds. Id.

See Mechanics' Liens, 3, 10; Water Rights, 4.

CONVERSION. See Banks and Banking, 1.

CONVEYANCES. See Deeds, 1-3.

COSTS.

1. In view of its language and the statute under which it was given, plaintiff's cost bond held to have covered judgment for costs in favor of defendant on her cross-petition. Wyo. Cent. Irr. Co. v. LaPorte, 522.
2. The question of costs is purely statutory, as they were not allowed as a rule at common law. Id.
3. Costs taxable as part of the judgment in favor of the prevailing party are part of the judgment and an incident thereto. Id.

See Parties, 1; Interest, 1.

COST BOND. See Costs, 1, 2.

COURTS. See Supreme Court, 1-3.

CREDITORS. See Attachment, 1-6; Banks and Banking, 7-8.

CRIMINAL LAW.

1. It is the general rule that the want of a direct, positive, and material allegation in the description of the substance, nature, or manner of the offense, cannot be supplied by any intendment, argument, or implication. Babbitt v. State, 27.
2. Under Compiled Statutes, 1910, Section 6173, providing that an indictment charging an offense against election laws, and alleging that the election was authorized by law, was sufficient, without stating names of officers holding the election, persons voted for, and offices to be filled, an indictment that does not state names of officers holding

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CRIMINAL LAW—*Continued.*

election, persons voted for, and offices to be filled, is insufficient, if it does not allege that the election was authorized by law. Id.

3. Where the only evidence in a prosecution for larceny on which the jury could rightfully find the defendant guilty, was the testimony of a witness who had himself been convicted of the larceny of a horse upon a plea of guilty, and was under sentence at the time, whose story was improbable and contradicted by several witnesses on material matters, held, insufficient to sustain a conviction. Jones v. State, 293.
4. In a prosecution for larceny, the testimony of one who had purchased the stolen horse, to the effect that he had bought it from the prosecuting witness, and not from the defendant, was material, but not sufficient to require a new trial as newly discovered evidence, there appearing a lack of diligence on the part of the defendant to procure it. Id.
5. In order to convict for the offense of keeping a house of ill fame as defined by Comp. Stat. 1910, Sec. 5909, the state must prove the house in question to be a house of ill fame, or bad repute, resorted to for the purpose of prostitution or lewdness, and that defendant kept the house, aided in keeping it, or was interested in it. Konopisos v. State, 350.
6. In a prosecution for keeping a house of ill fame, evidence held, insufficient to sustain conviction. Id.
7. The *corpus delicti* cannot be established by extra-judicial confessions or admissions unsupported by other evidence, nor are such admissions alone sufficient to support a conviction. Id.
8. One cannot be convicted of keeping a house of ill fame, under Comp. Stat. 1910, Sec. 5909, alone upon admissions made by him; there being no other evidence tending to prove the elements of the offense. Id.
9. In a prosecution under Comp. Stat. 1910, Sec. 5909, for keeping a house of ill fame, it was prejudicial error to permit the state on cross-examination of defendant to ask if he had not been arrested and convicted of being a pimp, to which he answered "Yes", over objection; such matter having no connection with the offense charged. Id.
10. An objection that the trial court had not jurisdiction to consider an information as an original case, there being an appeal pending in the court from the conviction of the

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CRIMINAL LAW—*Continued.*

identical offense, cannot be raised for the first time on appeal. Id.

11. It is only in extreme cases disclosing fundamental and prejudicial errors that prevented that fair and impartial trial of a defendant guaranteed to him by the Constitution, and amounting to a denial of justice, that an exception will be made to the statutory rule of law, requiring timely objections to be made and exceptions taken at the trial, to secure consideration of such alleged errors on appeal. Loy v. State, 381.
12. The word, "premeditated", when used in reference to first degree murder, implies an interval, however brief, between the formation of the intent or design and the commission of the act. Id. 381.
13. To justify killing in self-defense, defendant must not only have believed he was in danger, but the circumstances must have been such as to afford reasonable grounds for the belief. Id.
14. In a prosecution where defendant was convicted of murder in the first degree, evidence held sufficient to sustain a finding that the killing was premeditated. Id.
15. In a prosecution for murder in the first degree, whether defendant killed deceased in self defense, held, for the jury. Id.
16. An accused may be cross-examined by the state on matters to which he testified in chief. Id.
17. An accused cannot complain of the admission of evidence brought out on cross-examination of witnesses by his attorney. Id.

See Instructions, 1, 2; Jurors, 1-3.

CROSS-EXAMINATION. See Criminal Law, 16, 17; Evidence, 4.

DEDICATION.

1. Where a town plat showed a triangular piece of land at the intersection of three streets, not numbered or in any way designated as a street, alley, or public ground, and the town had never attempted to exercise ownership over it, and had recognized a claim of private ownership, the evidence does not establish a dedication to the public. Rohrbaugh v. Mokler, 514.

DEEDS.

1. A deed of warranty in due form, delivered in the life time of the grantor, but directing payments by grantee to persons therein named, within one year after decease of

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DEEDS—*Continued.*

grantor, held, not testamentary in character. Watts v. Lawrence, 367.

2. The usual test applied to determine whether an instrument is a deed or a will is, whether or not it passes a present interest or estate. If it creates or vests in the grantee a present estate, even though that estate be one which cannot be enjoyed until the death of the grantor, it is a deed. Id.

3. A deed from a mother to her son in form a warranty deed, directing that the grantee shall, within one year after grantor's death, pay certain sums to certain persons, "and upon filing receipts from the above-named persons, then this deed to be of full force and effect, otherwise to be null and void," held, a deed creating a present interest in the grantee at the time of its execution. Id.

DEPOSITIONS.

1. Where the deposition of a witness was taken in shorthand under an agreement that it should be transcribed, and be subject to objections, which, if made, should be passed upon by the Court before read, and each objection was ruled upon as the questions were read, no answer being read to the jury to which objection had been sustained, the fact that the deposition was not reduced to writing until the day it was offered, and the plaintiff had no opportunity to file general objections under the statute, was not prejudicial. Irrigation Co. v. LaPorte, 250.

DESCENT. See Adoption, 2, 3, 4.

DESCRIPTION OF LAND. See Mortgages, 6.

DILIGENCE. See New Trial, 1.

DISTRICT JUDGE. See Public Officers, 3, 4.

DIVORCE. See Children, 1-2.

"DRILLING OPERATIONS." See Oil Leases, 1.

ELECTIONS.

1. Compiled Statutes, 1910, Section 2310, prescribing a penalty for the defacement or destruction of a ballot, was originally enacted as a part of Laws, 1890, Chapter 80, relating to general elections, and is confined in its operation to violations of that statute. It does not apply to the defacement or destruction of a ballot used at a primary election for the selection of party candidates, held under Laws, 1911, Chap-

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ELECTIONS—*Continued.*

ter 23, since the latter statute specifically defines what acts shall constitute a violation of its provisions. Babbitt v. State, 27.

See Criminal Law, 1-3.

ESTOPPEL.

1. Statement of plaintiff's adjoining landowner to a purchaser of his land that a certain fence was the true boundary line, was not binding on plaintiff, so as to estop him from denying that such line was the true boundary line; such statement being made without his knowledge or assent. Carstensen v. Brown, 357.
2. Where adjoining landowners were both ignorant as to the true boundary, and each had an equal opportunity to ascertain the facts, but failed to do so, one of them was not estopped to deny that a fence was the true boundary line, by reason of the other making improvements on the subsequently disputed strip. Id.
3. The doctrine of equitable estoppel applies to municipal corporations in their acts with regard to the streets, though title to a street cannot be acquired by prescription. Rohrbaugh v. Mokler, 515.
4. Where evidence of facts necessary to establish an estoppel was admitted without proper objection, appellee may rely on estoppel, though he did not plead it, if his pleading might have been amended at the trial to allege the estoppel. Id.

See Contracts, 2, 3.

EVIDENCE.

1. Testimony of a partner and a cashier of the partnership that a note indorsed to the testifying partner by the partnership belonged to the partnership was not a mere legal conclusion at variance with the note itself and the indorsement thereon, being a fact within the personal knowledge of the witnesses. Chapman v. Bank, 138.
2. The admission of evidence in rebuttal over objection that it should have been offered in chief, being within the sound discretion of the trial court, will not be disturbed on appeal, in the absence of a showing of surprise or prejudice to the adverse party. Hunt v. City of Laramie, 160.
3. Parol evidence is admissible to show the purpose for which a mortgage is given where it does not tend to contradict the written evidence, and the notes and mortgages, but was for the purpose of proving an extraneous fact or surrounding circumstance, to-wit: The purpose and inten-

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EVIDENCE—*Continued.*

tion of the parties in making the transaction evidenced by the writing. Bachman v. Hurtt, 332-333.

4. Where defendants by their detailed cross-examination, as to conversations which a witness had with a person since deceased who was one of defendant's predecessors in title, made the witness their own, defendants cannot complain of the admission of such testimony against them. Gilpatrick v. Perry, 539.

See Cities and Towns, 1; Criminal Law, 3-8.

EXECUTION.

1. Execution must be issued by the clerk of the court rendering the judgment. Wyoming Cent. Irr. Co. v. LaPorte, 522.
2. Under Session Laws 1911, c. 22, authorizing filing of transcript of judgment in office of clerk of county other than where it was rendered, to make it a lien on the property of the judgment debtor in such county, no power exists in clerk of court in which transcript is filed to issue execution, such authority not being expressly conferred, and an execution so issued is void. The clerk of the court of the county where the judgment was rendered should issue execution, as authorized by Comp. Stat. 1910, 4668. Id.

EXCEPTIONS. See Criminal Law, 11.

EXEMPTION. See Homestead, 1.

FENCE.

1. Comp. St., 1910, Section 2578, defining lawful fence, including therein barbed wire, post and pole, and board fences, and Section 2588, making all persons maintaining any unlawful wire fence liable in a civil action for damages to animals, "by reason of such unlawful enclosure", held not to make landowner maintaining barbed wire fence other than described in statute liable for death of a cow which strayed into an alfalfa field, when the alfalfa was a dangerous feed, the words "unlawful enclosure" meaning merely "fence". Garretson v. Avery, 53.
2. The penal provisions of Comp. St., 1910, Sections 2587, 2588, are clearly intended not to require land to be enclosed, but to prevent the building or maintaining of a wire fence in any other manner than that declared to be lawful, which might cause injury to animals and perhaps persons by coming in contact therewith. They do not impose the duty of fencing out another's livestock and have no reference thereto. Id.

See Animals, 1-3.

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FINDINGS.

1. The submission of special findings to the jury is a matter within the sound discretion of the trial court, and only a clear abuse of judicial discretion, prejudicial to the complaining party, will justify reversal. Irr. Co. v. LaPorte, 249.
2. Findings of the trial Court upon conflicting evidence, in a suit by a partner for an accounting, to the effect that a co-partnership exists between plaintiff and defendants and that defendants claim that the money furnished by plaintiff was a mere loan to them was not sustained by the evidence, will not be disturbed on appeal. Richards v. Richards, 421.

See Adverse Possession, 3.

FORECLOSURE OF MORTGAGES. See Mortgages, 1-7.

GARNISHMENT.

1. In view of Comp. Stat. 1910, Secs. 4864, 4876, the maker of a note should not be charged as garnishee of payee under attachment served before maturity, unless it be affirmatively shown that before rendition of judgment, the note had become due and was still the property of the payee. Stockgrowers' Bank v. Millard, 394.

See Attachments, 1-6.

GUARDIAN AND WARD.

1. In an action by the guardian of a minor to impress a trust on real estate from the alleged unauthorized use of the minor's funds by former guardian in paying off a mortgage on real estate which had been the homestead of the minor's father, evidence held to show that the former guardian, who was the minor's mother, used her ward's property in discharging the mortgage, and hence the same should be revived as a lien. Gilpatrick v. Perry, 539.

HOMESTEAD.

1. A married woman, against whom a personal judgment is rendered, even though such judgment is also against her husband, is, under Comp. Stat. 1910—4615—entitled to a homestead exemption in her separate property on which she lived with her husband, though she is not the head of a family and as such entitled to the exemption provided by Sec. 4755. Bachman v. Hurtt, 332.

HUSBAND AND WIFE.

See Mechanics' Liens, 1-6; Homestead, 1.

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INDICTMENT AND INFORMATION. See Criminal Law, 1-2.

INJUNCTIONS.

1. An injunction will not be granted to restrain a county treasurer from advertising tax sale of land upon the ground that the advertisement would be futile and a waste of money, although it can be assumed or proved that there would be the same lack of bidders at the proposed sale as at former tax sale of same land, where advertisement was required by statute for enforcement of the tax. Commissioners v. Featherstone, 1.

INSTRUCTIONS.

1. Part of an instruction; "It is the fixed, deliberate, premeditated intention to kill which characterizes murder in the first degree, and the premeditated malice mentioned in the information need only to be such deliberation and thought as enables a person to appreciate and understand at the time the act is committed the nature of the act and its probable results," held, not misleading as telling the jury that all that was necessary to constitute murder in the first degree was that the defendant appreciated and understood the nature of the act and its probable results, when considered with the entire instruction. Loy v. State, 382.
2. In determining whether a particular instruction was misleading, the instructions must be considered as a whole. Id.

INTEREST.

1. The amount of damages resulting from a breach of contract for furnishing water for irrigation, not being susceptible of easy proof, nor ascertainable by mere computation, the general rule that interest is not allowable on unliquidated damages should be applied. Irr. Co. v. LaPorte, 250.
2. Where interest was improperly allowed, but the amount thereof was stated by the jury in its special findings, the judgment should not be reversed, but should be modified by deducting the amount allowed as interest from the amount of the judgment. Id.
3. As to interest after maturity, the laws of Colorado, where notes were made payable, will be presumed the same as the laws of Wyoming, until the contrary is shown. H. E. Wright Co. v. Douglas, 306.
4. At common law no interest was allowed on judgment; such matter being strictly statutory. Wyo. Cent. Irr. Co. v. LaPorte, 522.

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INTEREST—*Continued.*

5. Under Comp. Stat. 1910, 3357, relative to interest on judgments and decrees, and chapter 304, as to costs, a judgment for costs in favor of the prevailing party draws interest. Id.

INTOXICATING LIQUORS.

1. Comp. Stats., 1910, Section 1578, Subdiv. 9, having granted to town councils of incorporated towns power to license, regulate, or forbid the sale of intoxicants, any discretion of county commissioners under Comp. Stats., 1910, Section 2833, as to issuing a liquor license, does not include a right or power on the part of the commissioners to refuse the issuance of a license solely because of opposition to the operation of liquor saloons. State v. Commissioners, 75.
2. The discretion of a Board of County Commissioners to grant, refuse, or revoke a retail liquor license is limited to the cause stated in the statutes. (C. S. 1910, Sec. 2835-2836.) Peterson v. Guernsey, 272.
3. Where a retail liquor license is revoked by the Board of County Commissioners without the fault of the municipality that received the license money, the grantee cannot recover the unearned portion of such license fee paid voluntarily, and this is particularly true in view of Laws of 1911, Chap. 13, Sec. 1, providing that no liquor license money shall be refunded. Id.

INTERROGATORIES. See Pleadings, 5.

JUDICIAL NOTICE.

1. Courts will take judicial notice of the boundaries of the counties of the state, of the Government surveys, and of the fact that all the land in a given county, township or range lies in a certain direction from the principal meridian. Robinson Merc. Co. v. Davis, 484.
2. The Supreme Court will take judicial notice of the terms of court in the several districts. Gilpatrick v. Perry, 538.

JUDGMENTS. See Mortgages, 3; Mechanics' Liens, 5; Interest, 5; Execution, 2.

JURISDICTION.

1. Jurisdiction of the subject matter of an action cannot be conferred by agreement. North Laramie Land Co. v. Hoffman, 327.

See Appeal and Error, 36, 40; Supreme Court, 1, 2; Prohibition, 1; Criminal Law, 10.

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JURORS.

1. The question presented by a challenge to a juror, as having formed an opinion which would disqualify him under Comp. Stat. 1910, Section 6207, is one of mixed law and fact, and as far as the facts are concerned, is to be decided by the Court upon the evidence. Loy v. State, 381.
2. In finding that a juror was not disqualified as having formed an opinion, held, not manifestly erroneous under the evidence. Id.
3. It was harmless error to overrule a challenge to a juror for cause, where the juror was challenged peremptorily, although accused had exhausted his peremptory challenges; there being nothing to indicate that the jury which tried the case was not an impartial jury, or that any objectionable person sat upon the jury. Id.

LEASES. See State Lands, 1; Oil Leases, 1.

LIEN. See Mortgages, 1; Mechanics' Liens, 1-17.

LIMITATION OF ACTIONS. See Waiver, 1.

LIVESTOCK. See Animals, 1-3.

MARRIED WOMEN. See Homestead, 1; Mechanics' Liens, 1-4.

MATERIAL MEN. See Mechanics' Liens, 1-17.

MECHANICS' LIENS.

1. Where materials furnished and work performed by lien claimants under contracts with a husband were for the benefit of property jointly owned by the husband and wife, a prima facie case was made that the husband was acting as the wife's agent under the express provisions of Comp. Stat. 1910, Sec. 3817. Phelan v. Cheyenne Brick Co., et al., 493.
2. Where a husband and wife decided to build a house, on a lot jointly owned by them, for a home, and the wife selected the plans and specifications, went with the husband to the architect to have the plans drawn, joined in a mortgage to obtain money for construction, and was often upon the premises as the work progressed, her conduct showed that she either authorized or ratified her husband's act in contracting for the construction of the house. Id. 493-494.
3. In suits to enforce mechanic's liens, amendments to the petitions to conform to the proof, by alleging that the defendant husband, in contracting with the principal contractors,

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MECHANICS' LIENS—*Continued.*

was acting as agent for his wife as well as for himself, were properly permitted. Id.

4. In suits to enforce mechanic's liens, there was no fatal variance between lien statements filed as though both husband and wife were parties to the contract and the contract proved, which on its face purported to be a contract between the husband and the principal contractors, where the facts showed that the plaintiff was an undisclosed principal. Id.
5. Under Comp. Stat. 1910, 3808-3810, judgments enforcing liens of materialmen and laborers were in proper form, though they contained no personal judgment against the principal contractors, where such contractors were not served within the state and did not appear. Id.
6. In suits to enforce mechanic's liens, if the failure to serve the amended petitions on the principal contractors operated as a discontinuance of the suits against them, and created a defect of parties defendant, the defendant owners waived the defect, and could not avail themselves of it in the Supreme Court, where it was not raised by demurrer or answer in the trial court. Id.
7. In a suit to enforce a mechanic's lien, a stipulation, made to avoid a continuance, that an absent witness, if present, would testify that notice of the claim and of the intention to file a lien was served on defendants, of which notice a copy was attached and marked "B", constituted sufficient evidence of the notice of intention to file the lien, without formally offering the notice in evidence. Id.
8. In a suit to enforce a lien, there was no fatal variance between a petition, alleging that brick were furnished at the agreed price and were of the reasonable value of $154 and a lien statement, alleging that they were of the fair and reasonable value of $154; the evidence showing that they were of that value. Id.
9. A discrepancy in a lien statement as to the date materials were furnished was immaterial, where no one was misled thereby, though the statement would have been filed too late if the date mentioned therein had been the correct date. Id.
10. That the names of the principal contractors were given in a contract for the construction of a building as D. and C. in the lien statement as Henry D. and J. M. C., and in the petition as Henry S. D. and James M. C., was immaterial, where the owners were not misled, and the contractors

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MECHANICS' LIENS—*Continued.*

were described and identified in each instance as the contractors having such contract. Id. 495.

11. Where the petition in a suit to enforce a lien alleged the filing of a lien statement, but failed to allege that it was sworn to, an amendment curing the alleged defect was properly allowed. Id.
12. Where the materials furnished by a lien claimant were used in the construction of a house, the labor performed was on such house, or on materials that went into it during construction, and were accepted and became a part of the house, and the materials were such as were not infrequently used in the construction of houses, and were presumptively such as were contemplated by the plans and specifications, it was immaterial whether the claimant knew of the contract between the owner and the principal contractors. Id.
13. Where it was not shown that materials and labor furnished by a lien claimant were not such as were contemplated by the plans and specifications for the building, the presumption was that they met the requirements of such plans and specifications, having been ordered by the contractors and used in the building. Id.
14. Where suits to enforce liens were tried together, and in one of the suits one of the defendants testified to a written agreement between him and the principal contractors for the construction of the building, and identified it as an exhibit offered and received in one of the other cases, the failure to reoffer it in such case was immaterial. Id.
15. Where a contract for the construction of a building was not forfeited for failure to complete it within the time specified, one furnishing materials to the contractors thereafter, and prior to the contractors' abandonment of the contract, was entitled to a lien. Id.
16. In a materialman's suit to enforce a lien, evidence of the dealings between plaintiff and the principal contractors was competent to show the arrangement under which the materials were furnished as against the objection that it was hearsay. Id. 495-496.

MORTGAGES.

1. Where there was a substitution of one mortgage for another upon the same property, without the payment of money, for the convenience of parties, the acts being practically simultaneous, and parts of the same transaction, with the intent that the debt and security shall continue, the result

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MORTGAGES—*Continued.*

is a renewal of and not an extinguishment of the mortgage lien, and it does not give priority to an intervening judgment, even though there was a change in the mortgage debtor. Bachman v. Hurtt, 333.

2. Since a mortgage merely creates a lien upon the land and does not pass title thereto, a real estate mortgage may be executed to a partnership. Robinson Merc. Co. v. Davis, 484.
3. In this state, the title to property mortgaged, does not pass by the mortgage, to the mortgagee, even on condition broken. The mortgage simply creates a lien upon the land which must be sold on foreclosure to pass the title. Id.
4. A foreclosure sale of land under a valid mortgage lien, will at the expiration of the redemption period, extinguish a subsequent judgment lien. Id.
5. Notice of foreclosure of a mortgage executed to a partnership was not objectionable, because it recited the names of the partnership members not named in the mortgage; such recital being mere surplusage. Id.
6. The description of land in a mortgage by abbreviations instead of words, to designate the portions of sections, and failing to state whether the township was north or south, held, sufficient under evidence showing that all the land in the named township was in such township north. Id.
7. A mortgage given on land to which mortgagor had no title, containing no covenants of warranty, is insufficient to pass title to mortgagee on mortgagor's subsequent acquisition of title. Id.

See Guardian and Ward, 1; Evidence, 1.

MORTGAGE FORECLOSURE.

1. In an action to foreclose a mortgage, the principal of which was payable in monthly installments, some of which were not made promptly, which rendered computation of interest difficult, a tender of the amount demanded, in a petition for foreclosure, with interest to date and court costs, will not be held ineffective, although more money was actually due, the difference being deposited in court upon amendment of the petition by plaintiff; and a tender and deposit in court will not be held insufficient, although lacking a few cents to cover the exact amount, where the only controversy in the case was as to whether plaintiff was entitled to attorney's fees. Graves v. Burch, 193.
2. In a mortgage foreclosure, where mortgagor made a tender and deposit in court of the amount demanded in the peti-

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MORTGAGE FORECLOSURE—*Continued.*

tion, together with interests and costs to date of deposit, but it was found that plaintiff had erred in computing the interest, leaving a difference, which the defendant at once deposited, the defendant should not be required to pay interest upon the amount originally tendered and deposited. Id.

See Mortgages, 1-7.

NEGOTIABLE INSTRUMENTS.

1. In an action by a partnership, the payee of a note, for its conversion, the mere fact that it had been indorsed to one of the partners was not sufficient to overcome testimony of such partner and the cashier of the partnership that the note belonged to the partnership at the time of the conversion, in view of Comp. Stat., 1910, Secs. 3349, 3188; there being no showing of delivery. Chapman v. Bank, 138.
2. In a suit by partnership for the conversion of a note alleged to belong to the partnership, the existence of an indorsement by the partnership to an individual partner, without evidence of delivery to the indorsee, held not sufficient to disprove possession and ownership by the partnership as against direct evidence; Comp. Stat., 1910, Sec. 3174, not applying. Id. 139.
3. Where the maker of a note and mortgage past due informed payee by telephone that she would borrow money and pay him if he desired, and he replied that he did not need the money and that she should not worry herself about it, there was not a definite extension of time of payment, nor consideration sufficient to make a binding extension. Graves v. Burch, 192.
4. No previous demand is necessary to authorize a suit to recover upon a note and mortgage past due. Id. 192.
5. A note payable at the option of the holder at named banks in Denver and New York does not entitle the holder demanding payment in Denver to add to the principal and interest "handling charges to New York" or the cost of New York exchange. H. E. Wright & Co. v. Douglas, 306.

See Attorneys' fees, 1-5.

NEW TRIAL.

1. Newly discovered evidence which plaintiff in error could not have discovered by reasonable diligence before the trial and was without knowledge until after the trial, as to admissions made by his adversary to a third person, that

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NEW TRIAL—*Continued.*

the transaction in suit was a losing partnership and that he had agreed to perform services at nominal pay as his share of the loss, was competent as contrary to the theory of the petition. King v. Beaumier, 35.

2. In an action for services where there is a dispute as to what the contract was, newly discovered evidence of admissions of the party to a third person that the contract was different from that testified to by him, or was as claimed and testified to by the other party, is evidence of a different character and not merely cumulative so as to warrant refusal of a new trial. Id.

See Appeal and Error, 42, 43; Bill of Exceptions, 1-7.

NOTICE. See Mechanics' Liens, 7.

OBJECTIONS. See Criminal Law, 11.

OIL LEASE.

1. Allegations that the lessees of oil lands had staked the location of the first well, had placed lumber on premises for repairing a derrick for drilling purposes, and had contracted for bringing a derrick upon the leased lands within the time prescribed for commencing drilling operations, and that within ten days after such time limit a derrick was installed on the premises despite difficulties caused by snow, etc., held, not to establish, as a matter of law, that the lessees had failed to commence "drilling operations" within the prescribed time. Fast v. Whitney, 433.

PARTIES.

1. Under Comp. Stat. 1910, 4311, 4312, where no one except defendant in the action had any claim on the security of plaintiff's bond for costs, and the judgment in her action on such bond adjudged costs to her alone, it would have been useless to have brought other defendants named in the bond as obligees into the case as parties, and plaintiff and his surety on the bond cannot complain of any defect of parties plaintiff. Wyoming Central Irr. Co. v. LaPorte, 522.

See Mechanics' Liens, 6.

PARTNERSHIPS. See Mortgages, 1, 5.

PETITION IN ERROR. See Appeal and Error, 37; Attorneys, 1.

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PLEADINGS.

1. A motion to make a petition more definite and certain operates as a waiver of a lack of verification and an order of court permitting the movant to withdraw his motion does not operate or relieve him of the consequences of the waiver. Hunt v. City of Laramie, 160.
2. On the presentation of a motion to strike a petition on the ground that it lacked verification, there were affidavits offered which raised a question of fact as to whether the petition had not really been sworn to, and though the record fails to disclose how the question of fact was determined, it will be assumed as consonant with the action of the trial court in overruling the motion that there was a finding that the petition had been verified. Id. 160.
3. A defect in a cross-petition in failing to allege a breach of contract may be cured by admissions of the answer thereto. Irr. Co. v. LaPorte, 249.
4. Where in an action to enjoin the foreclosure of a chattel mortgage by notice and sale, the answer alleged that a tender referred to in the petition was insufficient, because attorney's fees were not tendered, and it appeared from the petition that notice of foreclosure was first published three days after tender of payment, a motion for judgment on the pleadings for want of a reply, will be denied. H. E. Wright & Co. v. Douglas, 305.
5. Where answers to interrogatories were not offered in evidence by either party, and defendants testified to the same matters while on the stand, any error in the order requiring defendants to answer such interrogatories, attached to the reply, was harmless to them. Richards v. Richards, 421.
6. Where objections to the sufficiency of a petition are made for the first time upon the trial, the pleading should be liberally construed and effect given to every legal intendment so that it may be sustained if possible. Fast v. Whitney, 433.
7. A petition alleging that an oil lease carried certain quoted indorsements extending the time for plaintiff lessees to commence work, held, sufficient to show an extension of the lease as against an objection to the introduction of evidence made at the trial. Id.
8. Any defects in a petition as to allegations of an extension of time granted to commence drilling operations under an oil lease, were cured by admissions in the answer that the

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PLEADINGS—*Continued.*

time for such work was extended to the date mentioned in the petition. Id.

9. An objection to the introduction of evidence upon the ground that the petition states no cause of action raises the question whether the pleading is legally sufficient. Id.

10. An answer, in an action by a broker for commission for furnishing purchaser, which denied each and every allegation of the petition not specifically admitted, and alleged that it was agreed that, if plaintiff produced a purchaser who would "purchase" and "pay" for the property at a certain price. then the defendant would pay plaintiff the sum of $5,000, "the difference between the price for which plaintiff was willing to sell and the price plaintiff represented the purchaser produced by him would pay therefor," held, to allege a special contract, and not to admit the contract of employment alleged in the petition, which was based on the general rule that a broker is entitled to compensation when he furnishes a buyer ready, willing, and able to perform. Murphy v. Livestock Co., 456.

See Mechanics' Liens, 11.

POSSESSION. See Adverse Possession, 1-3.

PRESUMPTIONS. See Mechanics' Liens, 13.

PROBATE LAW.

1. Where land deeded by plaintiff's decedent to defendant was condemned by a municipality, and the condemnation money placed in the hands of a stakeholder pending a determination of the rights of the parties, presentation of a claim to the executor was not a condition prerequisite to the commencement of suit to recover such money; the owner of the land being the owner of the condemnation money. Watts v. Lawrence, 368.

PROHIBITION.

1. Under the state constitution, Art. V, Secs. 2 and 3, prescribing the jurisdiction of the Supreme Court, and limiting its power to issue writs of prohibition to its appellate or revisory jurisdiction except as enlarged by its "general superintending control over all inferior courts", the Supreme Court has not original jurisdiction to issue a writ of prohibition against the State Engineer to restrain him from holding a threatened hearing on petition to cancel a permit to construct a reservoir, under Comp. St. 1910, Secs. 743-752, the State Engineer not being an "in-

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PROHIBITION—*Continued.*

ferior court" within the Constitution. State v. True, 314-315.

See Supreme Court, 2.

PUBLIC OFFICERS.

1. Under Const., Art. 4, Sec. 7; Art. 5, Sec. 19; Art. 6, Secs. 4, 7, and Comp. Stat., 1910, Sections 2084, 2090, 2112, 2276, 2277, the common-law rule of requiring an acceptance of a resignation by proper authority before it can become effective so as to divest an incumbent of the public office has not been abrogated in this state. State v. Jefferis, 115.
2. Under the rule requiring acceptance of resignation before it can become effective so as to divest an incumbent of office, acceptance may be manifested by the election or appointment of a successor by the officer, board, or body authorized to fill vacancies. Id.
3. Under Const., Art. 5, Section 19, and Art. 6, Section 4, a district judge shall, unless removed according to law, exercise the duties of his office until his successor is duly qualified. Id.
4. Under Const., Art. 4, Sec. 7; Art. 5, Sec. 19, and Art. 6, Secs. 4, 7, and Comp. Stat., 1910, Secs. 2084, 2090, 2112, 2276, 2277, district judge, who during term of office entered the service of the United States as a major in the Judge Advocate General's Department, upon returning to and resuming the office of district judge was a *de jure* and not a *de facto* judge, where he had not resigned and his office had not been declared vacant and no successor had qualified. Id. 116.

See District Judge, 1.

PUBLIC LANDS. See State Lands, 1.

RECORD ON APPEAL. See Appeal and Error, 1-43.

REAL PROPERTY.

1. A prior adjudication for plaintiff against defendant's assertion of title to the land, in a suit by plaintiff against defendant to recover the possession of crops grown by defendant on such land, did not bar defendant, in a subsequent suit by plaintiff for trespass in maintaining a flume and ditch across plaintiff's land, from asserting title to the right of way, since he might possess a right of way without owning the land. Allen v. Lewis, 86.

See Deeds, 1-3.

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REFORMATION OF INSTRUMENTS.

1. In an action to determine the right to money paid by a municipality in condemnation of realty alleged to have been granted by plaintiff's decedent to defendant, but erroneously described in the deed, it was not necessary for the trial court, in determining that title passed under the deed, to decree formal reformation to correct the description in the deed, so as to include the land in controversy. Watts v. Lawrence, 367-368.

See Deeds, 4.

SALES. See Statute of Frauds, 1-3.

STATE LANDS.

1. A purchaser of school land from the state is obliged to pay a prior lessee the appraised value of irrigation ditches made thereon, and water rights acquired therefor by such lessee. The provisions of Compiled Statutes of 1910, Section 632, are controlling. State v. Carey, 300.

STATEMENT. See Mechanics' Liens, 9.

STATUTES.

1. Comp. Stats. 1910, Section 2589, as copied from Revised Statutes, 1899, Section 1984, erroneously omits the words "on or before the first day of August, 1888", which were included in the original enactment, so that there was no general provision in the original section for the reconstruction of unlawful wire fences constructed after that date. Garretson v. Avery, 53-54.

See Fences, 1-3.

STATUTES—CITED OR CONSTRUED.

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STATUTES—CITED OR CONSTRUED—*Continued.*

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STATUTE OF FRAUDS.

1. A memorandum of sale which does not satisfy the statute of frauds, is inadmissible in evidence in an action for breach of a sales contract. Pottery Co. v. Onken Bros. Co., 287.
2. A memorandum of sale in order to satisfy the statute of frauds, must contain the substantial terms of the contract, expressed with such certainty that they may be understood from the contract itself, or some other writing to which it refers, without resorting to parol evidence, and when

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STATUTE OF FRAUDS—*Continued.*

reference is made in the memorandum to another writing, it must be so clear as to prevent the possibility of one paper being substituted for another. Id.

3. A sales order describing the subject matter of the contract as "1 car stoneware as per orders shown for same" is too indefinite to fulfill the requirements of the statute of frauds, and was properly excluded from evidence. Id. 287-288.

See Contracts, 4.

STATUTORY CONSTRUCTION.

1. A construction of a statute by the legislature as indicated by the language of a subsequent enactment is entitled to great weight. Peterson v. Town of Guernsey, 272.
2. To justify the presumption of an intent to repeal one statute by the enactment of another, either the two statutes must be irreconcilable, or the intent to effect a repeal must be otherwise clearly expressed. State v. Carey, 300.
3. Where two legislative acts are repugnant to, or in conflict with each other, the one last passed, being the latest expression of the legislative will, must govern although it contains no repealing clause. Id.

See Adoption, 1, 2.

STOCKHOLDERS.

See Banks and Banking, 6-8.

SUPREME COURT.

1. The original jurisdiction of the Supreme Court is conferred by the constitution, and it has only such power in cases originally brought before it, as is directly conferred by that instrument, or necessary to a full exercise of the powers conferred. State v. True, 314.
2. The Supreme Court has only such jurisdiction to issue the writ of prohibition and other writs as is directly conferred by the constitution, or necessary to a full exercise of the powers conferred. Id.
3. A district judge called in to hear a case in the Supreme Court under Const. art. 5, sec. 6, and as amended (see Laws 1917, c. 115) is a "justice" of the Supreme Court within the meaning of Const. art. 5, secs. 4, 5, providing that the justices of such court shall be elected, and that a majority shall be necessary to constitute a quorum. Phelan v. Cheyenne Brick Co., 496.

See Jurisdiction, 2.

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TAXATION. See Action, 1-4; Injunction, 1.

TENDER.

1. Where tender of payment of notes is refused for reasons other than that it does not constitute an offer of lawful money, or is not the kind of money or property in which payment is to be made by the terms of the contract, the creditor waives that objection. H. E. Wright Co. v. Douglas, 306.

See Pleadings, 4; Attorneys' Fees, 5.

TRANSCRIPT OF JUDGMENTS. See Execution, 1-2.

TRESPASS. See Animals, 1-3.

UNLIQUIDATED DAMAGES. See Interest, 1, 2.

VARIANCE. See Mechanics' Liens, 8.

VENDOR AND PURCHASER.

1. Where vendors agreed to convey all lands to which it secured good title during a two-year period and at the expiration of the period to submit muniments of title to named arbiters for determination as to sufficiency of its title to lands not theretofore conveyed, they were not required, upon expiration of the period, to tender the deed to land for which they had only such muniments of title possessed at date of contract, and were not bound to submit such muniments of title to arbiters; purchasers having been dissatisfied therewith at date of contract. Merrill v. Cattle Co., 219.
2. Where a corporation, having arranged to distribute the assets to its stockholders according to their respective interests, agreed to convey to certain stockholders such lands as it could perfect its title to during two-year period, and gave the stockholders possession thereof during such period, time was of the essence of the contract. Id.
3. Vendor being owner of forest lieu scrip in the name of another, giving it the right to select, enter, and patent in the name of such other party, vacant public lands, and having agreed to convey such lands to which it is able to obtain title during a certain period, was not bound to convey land patented during period, where the land was not conveyed to vendor by grantee named in patent within period. Id.
4. Title passes to grantee named in patent to United States vacant public land on date that patent is issued and recorded in proper office at Washington. Id.

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VENDOR AND PURCHASER—*Continued.*

5. A contract, requiring vendor to convey lands to which it obtains title during certain period and to submit to arbiters at expiration of period such "muniments of title as it or its agents or trustees then possess or possesses," construed to provide for submission to arbiters of documentary evidence of title in actual possession and control of vendor, as distinguished from constructive possession, at the expiration of period. Id.
6. If a land contract be construed as obligating vendors to sell after a certain date and does not obligate purchasers to accept land after such date, it is lacking in mutuality and will not be specifically enforced. Id. 220.
7. Where purchasers, knowing that vendors had obtained title to land they had agreed to convey upon obtaining title within a certain period, and knowing of prospective increase in value because of discovery of oil wells on other lands, did not sue for specific performance until after tests had been made and the land found to produce oil, they will be estopped from asserting their right to specific performance at such time. Id.
8. Specific performance of a land contract is not decreed as a matter of course, but is granted or withheld according as equity and justice seem to demand in view of all the circumstance of the case. Id.

WAIVER.

1. A defendant's failure to raise the statute of limitations either by demurrer or answer constitutes a waiver of the defense. Watts v. Lawrence, 368.

See Appeal and Error, 36.

WATER RIGHTS.

1. There is no statute requiring that the State Board of Control be made a party to proceedings on appeal, from its decision to the District Court, notwithstanding that Comp. Stat., 1910, Section 733, provides that the Attorney General shall represent the Board of Control in such cases. Hunt v. City of Laramie, 160.
2. The city which appeared before the State Board of Control and contested an application to appropriate waters claimed by the city, was an "aggrieved party" upon the appropriation being granted and could appeal to the District Court under the provisions of Comp. Stat., 1910, Section 733. Id.
3. Percolating waters developed artificially by excavations and other artificial means belong to the owner of the land upon

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WATER RIGHTS—*Continued.*

which they are developed, and cannot be appropriated as waters of the State under Const., Art. VIII, Sections I and II. Id. 161.

4. A contract for the sale of water rights for irrigation providing for delivery at a point to be selected by plaintiff within three miles of the land, but silent as to the time of delivery, under which plaintiff indicated the point where water should be delivered, and defendant commenced to make delivery in the spring, but failed to make delivery thereafter during the irrigation season, held sufficient to support an action for damages, though the first of six annual installments for payment for the water rights was not due until after such irrigation season. Irr. Co. v. LaPorte, 249-250.

See State Lands, 1.

WILLS. See Deeds, 1, 2, 3.

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WRIT. See Prohibition, 2.

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HARVARD LAW

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